

CRIME, JUSTICE AND SOCIAL DEMOCRACY: PROCEEDINGS OF THE 3RD INTERNATIONAL CONFERENCE, 2015, VOLUME 1



Crime and Justice Research Centre, Faculty of Law
Queensland University of Technology

9-10 JULY 2015



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**CRIME, JUSTICE AND SOCIAL
DEMOCRACY: PROCEEDINGS OF THE 3RD
INTERNATIONAL CONFERENCE, 2015, VOLUME 1**

Editors: Helen Berents and John Scott

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Editors' Introduction

We are pleased to present these selected papers from the proceedings of the 3rd *Crime, Justice and Social Democracy International Conference*, held in July 2015 in Brisbane, Australia. Over 350 delegates attended the conference from 19 countries. The papers collected here reflect the diversity of topics and themes that were explored over three days.

The *Crime, Justice and Social Democracy International Conference* aims to strengthen the intellectual and policy debates concerning links between justice, social democracy, and the reduction of harm and crime, through building more just and inclusive societies and proposing innovative justice responses. In 2015, attendees discussed these issues as they related to ideas of green criminology; indigenous justice; gender, sex and justice; punishment and society; and the emerging notion of 'Southern criminology'. The need to build global connections to address these challenges is more evident than ever and the conference and these proceedings reflect a growing attention to interdisciplinary, novel, and interconnected responses to contemporary global challenges.

Authors in these conference proceedings engaged with issues of online fraud, queer criminology and law, Indigenous incarceration, youth justice, incarceration in Brazil, and policing in Victoria, Australia, among others. The topics explored speak to the themes of the conference and demonstrate the range of challenges facing researchers of crime, harm, social democracy and social justice and the spaces of possibility that such research opens.

Our thanks to the conference convenor, Dr Kelly Richards, for organising such a successful conference, and to all those presenters who subsequently submitted such excellent papers for review here. We would also particularly like to thank Jess Rodgers for their tireless editorial assistance, as well as the panel of international scholars who participated in the review process, often within tight timelines.

Dr Helen Berents and Professor John Scott, School of Justice, Faculty of Law, QUT.

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Policing Online Fraud in Australia: The Emergence of a Victim-Oriented Approach

Cassandra Cross, School of Justice, Queensland University of Technology, Australia

Conference subtheme: Policing diverse people and places

Abstract

Online fraud is a global problem. Millions of individuals worldwide are losing money and experiencing the devastation associated with becoming a victim of online fraud. In 2014, Australians reported losses of \$82 million to the Australian Competition and Consumer Commission (ACCC) as a result of online fraud. Given that the ACCC is one of many agencies that receive victim complaints, and the extent of underreporting of online fraud, this figure is likely to represent only a fraction of the actual monetary losses incurred. The successful policing of online fraud is hampered by its transnational nature, the prevalence of false/stolen identities used by offenders, and a lack of resources available to investigate offences. In addition, police are restricted by the geographical boundaries of their own jurisdictions which conflicts with the lack of boundaries afforded to offenders by the virtual world.

In response to this, Australia is witnessing the emergence of a victim-oriented policing approach to counter online fraud victimisation. This incorporates the use of financial intelligence as a tool to proactively notify potential victims of online fraud. Using a variety of Australian examples, this paper documents the history to this new approach and considers the significance that such a shift represents to policing in a broader context. It also details the value that this approach can have to both victims and law enforcement agencies. Overall, this paper argues that a victim-oriented approach to policing online fraud can have substantial benefits for both police and victims.

Introduction

Online fraud is a global phenomenon which devastates the lives of millions. In Australia alone, the Australian Competition and Consumer Commission (ACCC) (2015) reported individual losses to victims of fraud at \$82 million for 2014. Given that the ACCC is just one of many bodies that can take reports, coupled with the large underreporting of online fraud, this figure is likely to be the tip of a substantial iceberg. Despite the large monetary losses, there is little that law enforcement agencies can do. Online fraud has a number of unique characteristics which mean that traditional methods of policing are not effective. Consequently, police agencies have had to rethink their approaches to online fraud.

As a result, Australia has witnessed the emergence of a victim-oriented approach to policing online fraud that uses financial intelligence to proactively identify and contact potential online victims. This paper examines the rise of this and explores its impact and effectiveness for both victims and law enforcement agencies. First, this paper provides an overview of online fraud and the characteristics that lead to such high levels of underreporting as well as the inability to use traditional methods of enforcement. Second, the paper details the rise of a victim-oriented approach, using a combination of police and consumer protection agencies examples from Queensland, Western Australia, South Australia, and federally with the ACCC. These agencies and jurisdictions have been chosen as they have implemented the victim-oriented approach. Third, this paper considers the effects of this approach in terms of the impact on victims and for policing as a whole. Overall, this paper argues that there are strong benefits to the victim-oriented approach which warrant further analysis. To date, there is only one known paper (Cross and Blackshaw 2015) that has examined this approach specifically as it operates in Western Australia. This work is significant because there are likely benefits that international agencies can learn via the Australian example.

Background and context to online fraud

Online fraud can be defined as 'the experience of an individual who has responded through the use of the Internet to a dishonest invitation, request, notification or offer by providing personal information or money which has led to the suffering of a financial or non-financial loss of some kind' (Cross, Smith and Richards 2014: 1). Online fraud is not a new crime; rather, the internet has enabled fraud to be perpetrated in different ways, and on a much larger scale than previously (Yar 2013). The internet provides an easy mechanism for offenders to contact potential victims on a very cost effective basis, and it offers a layer of protection for offenders through increased anonymity compared to face-to-face interactions (Yar 2013). This has had a significant impact on how fraud has been perpetrated in recent decades.

Offenders can use an endless number of approaches to target potential victims. However, there are two categories of online fraud that dominate victim statistics: advance fee fraud and romance fraud. Advance fee fraud (AFF) is when a victim is asked to send a small amount of money in return for a larger amount of money promised in the future (Ross and Smith 2011). Typically, if the victim complies, the requests for money continue and may escalate in amount. It is commonplace for victims to lose tens of thousands, if not hundreds of thousands, of dollars as a result. AFF can disguise itself as business and investment opportunities, unexpected lottery wins, inheritance notifications and/or employment schemes.

A derivative of AFF is romance fraud, though this is now an established category in its own right. Romance fraud uses the premise of a legitimate relationship to extract (often large) amounts of money from a victim (Rege 2009). The use of online dating and social media sites for people to establish new relationships has proliferated and this has seen an emergence of romance fraud as a dominant method of defrauding unsuspecting victims. Offenders develop trust and rapport to mirror a genuine relationship and then target the vulnerabilities of individuals through this relationship to financially exploit victims. This type of fraud is one of the most devastating for victims, as they not only lose money but they also grieve the loss of the relationship (Whitty and Buchanan 2012).

While these categories of fraud tend to originate in an online environment, it is important to recognise that offenders will use all mediums of communication. Fraud still occurs in face-to-face situations, as well as traditional mail and telephone scenarios. Highly skilled offenders will now use a combination of all communication methods to establish and maintain a connection with victims. This includes email, online messaging services, webcams, text messages, telephone calls and face-to-face interactions to perpetuate their lies and extract the largest amount of money possible out of individual victims. Offenders will use a range of social engineering techniques designed to persuade victims into compliance with any request (Drew and Cross 2013).

Policing online fraud

Historically, fraud has not been the priority of police agencies (Button 2012). Apart from the City of London Police in the UK (who are the lead agency for economic crime in the UK and located in the financial capital of the world), most police agencies do not have fraud as a stated priority for their organisation. While there is recent evidence to suggest that resources targeting fraud are increasing in the UK (Button, Blackburn and Tunley 2015), it is still arguable that the problem posed by fraud and economic crime more broadly is not commensurate with overall police resources. Within Australia, there are no specific details of the number of police nationally who are dedicated to investigating fraud, nor which unit they are attached to within each police organisation.

Regardless of the extent of police resources and the level of priority given to fraud, there are unique characteristics that create distinct challenges in policing online fraud. The traditional 'reactive' approach to fraud is not viable, given the lack of reports received by police agencies from victims and the inability of police to investigate compared to other types of crime. Broadly speaking, fraud has one of the lowest

reporting rates across all crime types (Button, McNaughton-Nicolls, Kerr et al. 2014). Studies across the UK, US and Canada estimate that less than one-third of all victims report fraud to authorities (Schoepfer and Piquero 2009). This is also consistent with Australian research (Smith 2007, 2008). Further, there is evidence to suggest that fraud experienced in an online context is less likely to be reported compared to fraud perpetrated offline (Smith 2007, 2008). There are several established reasons for victims not reporting online fraud, which include the shame and stigma associated with this particular type of crime (Cross 2015), not knowing who to report to (Button, Tapley and Lewis 2012) and a lack of consistent definitions of what constitutes an offence (Button, Tapley and Lewis 2012). Added to this, are several unique characteristics of online fraud that present as barriers to police taking action (see Button 2012; Cross and Blackshaw 2015). The first is the transnational nature of the offence. In most circumstances, offenders, victims and the money are in separate countries. While the internet can be understood as one global jurisdiction, police agencies are still founded upon geographical boundaries for their authority. Therefore, it is difficult to ascertain which police agency is responsible for investigating the complaint. The second challenge focuses on identity crime, where offenders take on the identity of a legitimate person or company, or may create a completely false and fictitious identity to perpetrate their crimes. The third is the technological aspects of online offences, whereby police may not have the required skills or expertise to understand or investigate an offence which has been perpetrated in a virtual environment. Lastly, legislation is inadequate to address the problem of online fraud, due to the lack of consistency in definitions and the multiple jurisdictions involved. Overall, this compounds the investigative challenges. Online fraud poses serious challenges for police investigation, even if prioritised (Cross and Blackshaw 2015).

Given the severity of these challenges, the need for an alternative approach is clear. The reactive, investigative policing model is neither suitable nor effective for this crime type. On this basis, a victim-oriented approach using financial intelligence to proactively identify potential online fraud victims has emerged. This approach acknowledges that it is of greater benefit to target a reduction in the amount of money being transferred as the result of fraud and consequently decrease victimisation, rather than attempt to investigate and prosecute after victimisation has occurred. The following section examines the emergence of this approach in Australia.

The emergence of a victim-oriented approach using financial intelligence

As established, online fraud poses distinct challenges to law enforcement. Therefore, Australian authorities have turned to the use of financial intelligence in a victim-oriented approach to reducing the losses and harm sustained to victims experiencing online fraud. Financial intelligence refers to the documented financial transactions that take place between Australia and overseas. There is no monetary limit to the transaction; instead identification is based purely on the geographical location of the transaction. The following presents a chronological account of a victim-oriented approach to policing online fraud through the use of financial intelligence and focuses on each of the relevant agencies and jurisdictions (Queensland, Western Australia, South Australia and, federally, the ACCC) that have implemented this approach.

Queensland

The Queensland Police Service (QPS) was the first Australian agency to recognise online fraud as a legitimate crime problem and is arguably the jurisdiction that has pioneered the victim-oriented approach to this crime worldwide. This started in late 2005, with anecdotal evidence suggesting that online fraud (predominantly Nigerian based) was a problem, but QPS had no recorded statistics to support this assertion (Hay 2015). Police obtained a list of 26 people who were sending money to Nigeria and police officers called those on the list to ask them the circumstances surrounding their transactions. Of the 26 individuals, 25 were identified as victims of online fraud who had collectively lost \$7.2 million (Hay 2015: 1). Even more disturbingly, some victims had been sending money for over a decade, but had not made any complaints to the police (Hay 2015: 1). Consequently, the QPS commenced Operation Echo

Track, where they used financial intelligence to identify 139 individuals sending money to Nigeria. Police called these people to ask the reasons surrounding the transactions and 134 individuals were found to be victims of fraud who had lost \$18.2 million collectively (Collins 2015: 4). Three years later, QPS initiated Operation Hotel Fortress, which identified 200 people sending money to Nigeria and again questioned them on the circumstances surrounding the money transfers. In this group, 186 were identified as victims of online fraud, who had lost in excess of \$21.5 million (Collins 2015: 5). In combination, the results from both Echo Track and Hotel Fortress indicate the substantial losses incurred through online fraud and also illustrate the pervasive nature of victimisation. In most cases, victims did not realise they were being defrauded, had not reported it to the police, and sadly, in some cases, continued to send money after police intervention. Since this time, QPS has 'intermittently undertaken approaches to potential victims, advising them of the scam and warning them against continuing to send money' (Queensland Organised Crime Commission of Inquiry 2015: 401). Currently, QPS have no specific project identifying potential advance fee fraud victims (Queensland Organised Crime Commission of Inquiry 2015: 402). However, this proactive approach initiated by the QPS to contact potential victims through the use of financial intelligence can be seen as a turning point for the policing of online fraud in Australia.

Western Australia

Taking their lead from Queensland, the West Australian Police (WAPOL) established Operation Sunbird in 2012 to target AFF victimisation in Western Australia. This was later renamed Project Sunbird, and a formal partnership was entered between WAPOL and the West Australian Department of Commerce (Commerce), who were also concerned about the victimisation of individuals (Department of Commerce nd).

Project Sunbird targets financial transactions sent between West Australia and five West African countries: Nigeria, Ghana, Togo, Sierra Leone, and Benin (Department of Commerce 2014). It is a five stage process, with the stages shared between both agencies. The first is identification, whereby WAPOL access financial intelligence. They screen this list for likely legitimate transactions and then forward the remaining details to Commerce. The second stage is intervention, whereby Commerce sends a letter to the households on the list, which acknowledges that the person is sending money to one of the five identified countries and outlines the reasons why WAPOL/Commerce believe the recipient may be a victim of fraud. The letter encourages the cessation of financial transactions and provides a point of contact to discuss the matter further. If the individual continues to send money three months after this initial letter, a second letter is sent, outlining the belief that the person could be a fraud victim and encouraging the termination of transactions. In addition, a fact sheet developed specifically for victims of fraud is enclosed with this second letter.

The third stage is interruption, whereby Commerce liaises with banks, remittance agencies, and other relevant organisations, to block accounts of identified offenders and potential victims. This also includes education campaigns and media releases to increase the overall awareness. The fourth stage revolves around intelligence, where WAPOL and Commerce collect information from the letter recipients who make contact. This then leads into the last stage, investigation, whereby WAPOL focus on local offenders if relevant or makes appropriate referrals of intelligence to other national and international police agencies (see Cross and Blackshaw 2015 for further details about Project Sunbird). Project Sunbird is an ongoing part of the work undertaken by WAPOL and Commerce.

South Australia

In a very similar operation to their West Australian counterparts, the South Australian Police (SAPOL) established Operation Disrepair in 2013 (SAPOL 2014: 27). This targeted South Australians who were transferring funds to Nigeria and Ghana (SAPOL 2014: 27). In a similar approach to Project Sunbird, SAPOL identify potential victims and send a letter out which conveys their suspicion that the individual may be a victim of online fraud (Nankervis 2014). The stages mirror that of Project Sunbird, with the only

difference being that SAPOL are not working in partnership with a consumer protection agency, rather they undertake the five stages themselves. To this day, Operation Disrepair continues to alert potential victims in South Australia.

Australian Competition and Consumer Commission (ACCC)

In August 2014, the ACCC launched their National Scams Disruption Project, which adopted the same model of Project Sunbird and Operation Disrepair. The most notable difference is that the ACCC is a consumer protection body and not law enforcement. The National Scams Disruption Project initially targeted citizens across New South Wales and the Australian Capital Territory who were sending money to either Nigeria or Ghana. In 2015, this has been expanded to include Victoria, Tasmania, and the Northern Territory (ACCC 2015: 2) and is ongoing across each of these jurisdictions. Similar to Sunbird and Disrepair, the ACCC access financial intelligence to send letters to individuals considered likely fraud victims and encourage them to desist their money transfers (Bainbridge 2014). While the ACCC is an enforcement body in its own right, it has different law enforcement powers and, therefore, works in collaboration with local police as required.

Examining the use of financial intelligence to reduce online fraud

As detailed, several Australian agencies and jurisdictions now employ a victim-oriented approach to targeting online fraud victimisation. They use financial intelligence specifically aimed at individuals who are sending money to known high risk West African nations, and who are suspected to be victims. This proactive approach has seen a combination of police and consumer protection agencies send letters to possible fraud victims to advise them of their suspicions and to encourage the recipients to cease money transfers.

The use of financial intelligence to actively contact potential victims represents a large shift in policing. Traditionally, police have relied upon individuals being able to identify themselves as victims and contact police to lodge a complaint. In most circumstances, police do not actively contact individuals to inform them of their likely victim status. However, this new proactive model has distinct benefits when applied to online fraud. As previously stated, the majority of online fraud victims do not realise they are in fraudulent situations where they are involved with criminals. Rather, they believe they are involved in legitimate business/romantic relationships. A person who is unaware that a crime is being perpetrated against them is highly unlikely to report this to authorities (Hay 2015: 1).

The use of dedicated operations to target online fraud overcomes some of the barriers experienced by victims who do attempt to report their experiences. It is well established that fraud victims face many hurdles in navigating the vast array of agencies that can take complaint, including police, consumer protection and financial institutions (Button, Tapley and Lewis 2012; Cross, Richards and Smith forthcoming). The establishment of Project Sunbird, Operation Disrepair, and the National Scams Disruption Project ensures that letter recipients can directly engage with an agency who understands their situation. This removes any confusion that victims may have in locating an appropriate authority that understands the nature of online fraud victimisation. It also removes the likelihood that the agency will not accept a complaint or attempt to refer them to another agency.

The establishment of this approach also gives official acknowledgement to online fraud as a legitimate crime problem, and recognises the status of those who have experienced online fraud as legitimate victims (Cross and Blackshaw 2015). Police are able to use financial intelligence to better understand the nature and extent of the problem and consequently, this enables them to more effectively respond. There is strong evidence to demonstrate the strength of the victim blaming discourse towards online fraud victims (Cross 2015) and many victims of online fraud experience immense difficulties in getting an agency to understand their situation. Instead, they are subjected to direct and indirect victim blaming attitudes from agencies, the trivialisation of their circumstances, or being told they are not a victim of

crime in the first place (Cross, Richards and Smith forthcoming). This can have a devastating effect on victims and exacerbate the trauma that they are already experiencing (Cross, Richards and Smith forthcoming). An approach that stems from a law enforcement or consumer protection agency portrays an image to the wider public that online fraud is a real crime which can have detrimental impacts on the lives of its victims. Over time, this may contribute to countering the negative stereotype that currently exists for this particular group of victims (Cross 2015).

Initial analyses from Project Sunbird, Operation Disrepair, and the National Scams Disruption Project indicate positive results. For example, Project Sunbird staff report that approximately six out of 10 letter recipients cease sending money after receiving the initial letter (Department of Commerce 2014). A further four out of 10 stop sending money after receipt of the second letter (Department of Commerce 2014). In South Australia, Operation Disrepair staff observed that out of 781 letters sent to 600 suspected victims (across July 2013 – June 2014) only 70 individuals were recorded as continuing to send money (SAPOL 2014: 27). Similar success was recorded by the ACCC, in that approximately 70 per cent of letter recipients desisted with transactions to all overseas countries (for at least a six-week period) (ACCC 2015: 2). Overall, these early results show promise as to the effectiveness of this approach in reducing the number of victims of online fraud as well as reducing the large degree of financial losses incurred as a result of this particular crime. To date, one study has examined Project Sunbird in detail (see Cross and Blackshaw 2015) and this reiterates the observed positive impact of this approach in its infancy.

Despite these encouraging statistics, it is also important to acknowledge the limitations to this approach which arise from both the approach itself and the data to date. It is clear that Project Sunbird, Operation Disrepair and the National Scams Disruption Project have recorded encouraging results from the initial evaluation of their intervention. However, each jurisdiction has a different timeframe through which they follow up letter recipients to determine if they continue to send money. For Project Sunbird, this is three months (Cross and Blackshaw 2015) and for the National Scams Disruption Project, it is six weeks (ACCC 2015: 2). In addition, the current monitoring of financial transactions only encompasses a small number of West African countries. All operations target Nigeria and Ghana, but only Project Sunbird covers the additional countries of Benin, Sierra Leone and Togo to initially identify potential victims. There are restrictions to explore financial transactions outside these West African countries. Therefore, it is not well documented whether victims stop sending money completely, whether they stop and then start again, or whether there is a displacement effect, whereby victims continue sending money to other countries, or via other means.

This is overcome in the National Scams Disruption Project whereby the ACCC use Nigeria and Ghana to identify potential victims, but monitor financial transactions across all countries to determine if the person has stopped sending money completely. Only those who have ceased all transactions (not just Nigeria and Ghana) are included in the percentage counts. However for Sunbird and Disrepair, the data can only ascertain that a victim is not sending money to a specific range of countries over a restricted period of time. Further work is needed in this area to more rigorously evaluate the sending patterns of letter recipients and determine the actual extent of their transfer activity. It is also important to determine whether the preliminary data obtained by the ACCC, which shows a large percentage of alleged victims ceasing overseas transfers completely, translates both to other jurisdictions and across a longer period of time. This would likewise help to determine the true impact that receiving a letter has on a potential online fraud victim. At present, there is no direct evidence to demonstrate that the letter is the catalyst for recipients to cease their transactions. Anecdotal evidence received by each of these three jurisdictions is overwhelmingly positive from letter recipients who are appreciative of receiving a letter, and to date indicates the letter as a factor in their decision to stop sending money. However, there is scope for further research in this area.

The future of victim-oriented approaches

This paper has documented the emergence of a victim-oriented approach to targeting online fraud in Australia, through the use of financial intelligence to identify potential victims. Given the nature and characteristics of online fraud, its low reporting rate and the challenges faced by law enforcement in attempting to investigate this crime, the emergence of an alternative approach is a welcome development. The use of financial intelligence to target online fraud victims was pioneered by the QPS in 2006. Since then, this approach has been embraced and further refined across other Australian jurisdictions, through sending letters to potential victims of online fraud. There is currently no known approach used by any international agency or jurisdiction which is equivalent.

This approach challenges traditional reactive investigative policing methods. However, there are strong arguments as to why it is both an appropriate and effective means to target online fraud. First, it overcomes the barrier of individuals needing to identify themselves as victims. Second, it provides a safe means to engage with appropriate authorities. Third, it acknowledges online fraud as a legitimate crime problem and recognises those who experience it as genuine victims. Overall, this approach has the ability to overcome some of the most pressing needs articulated by online fraud victims and the negativity currently associated with their reporting experiences (Cross, Richards and Smith forthcoming).

While there are limitations to current knowledge on the effectiveness of using financial intelligence to target online fraud and many opportunities for further research in this area, overall the current evidence provides a strong platform for continuing this approach. It is hoped that both law enforcement and consumer protection agencies recognise the emerging value of this approach to online fraud and continue to work together to reduce the nature and extent of online fraud for victims across Australia. Online fraud is unlikely to disappear in coming years and, therefore, it is imperative that alternatives such as those employed by Project Sunbird, Operation Disrepair, and the National Scams Disruption Project remain firmly on the agendas of law enforcement and consumer protection agencies nationwide.

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Metadata Retention: A Review of the Policy Implications for Australians

Rick Sarre, School of Law, University of South Australia, Australia

Conference subtheme: Corporate crimes and new technologies

Abstract

Legislation was passed in Australia in 2015 to require telecommunications service providers to retain their 'metadata' for two years. But there are problems associated with the plan, including the threat to privacy, and the threat that the retention system can be circumvented entirely. All the while, there is doubt that the expensive legislative scheme will actually do what it is designed to do: forestall terrorism. This paper will outline some appropriate legal, political and technological questions that will need to be asked (and answered) in order to help Australian policy-makers and citizens generally to work through the issues and to resolve the contradictions.

Introduction

In the last few years, Australia has witnessed a rapid growth in technological innovations that makes surveillance of the populace by governments and non-governmental players more accessible, more covert and potentially more insidious (Sarre, Brooks, Smith et al 2014). But are the benefits worth the financial costs? Are Australians ready for the foreshadowed limitations of their privacy? How does a society find an appropriate balance between the rights of its citizens to enjoy freedom from the prying eyes of others, and the legitimate interests that the state (and increasingly its media, corporations and private citizens) might have in monitoring them (Kearon 2013)? A balance is required here, as expressed by the then Australian Communications Minister Malcolm Turnbull in July 2015:

[W]e need to recognise that getting the balance right is not easy (not least because the balance may shift over time) and we are more likely to do so if there is a thoughtful and well informed public debate — weighing up the reality of the national security threat, the effectiveness of particular proposed measures and then asking whether those measures do infringe on our traditional freedoms and if so whether the infringement is justifiable. (Turnbull 2015)

Metadata retention is the latest government strategy in the current legislative suite of anti-terrorist initiatives in Australia. It involves the collection and storage of communications information from users by their providers. It includes details of the telephone numbers called by the user, the length of time of each call, the time and the date of the call, and the location of both caller and receiver. It includes details of the type of service used, such as short message service (SMS) texts. Despite equivocation by the Attorney-General, Senator George Brandis, and the Communications Minister, Senator Mitch Fifield, data retention will include archived material on internet use and email data: the date and time an email is sent and to whom, the time of internet connections and the volume of uploads and downloads, internet addresses contacted, and the location of the communications device. By virtue of the recent changes to the law that came into effect on 13 October 2015, telecommunications companies (telcos) are now compelled to collect and store these data for two years.

There are three questions that emerge from this initiative: Firstly, can we safely assume that metadata retention delivers, as a matter of practical operation, an enhancement of national security? Secondly, is the value that data retention brings (assuming that there is value) worth the substantial financial cost? Thirdly, is there a chance that the curtailment of civil liberties (and the potential breaches of

privacy) associated with data retention is counter-productive to the goal of enhanced security? Each of these questions is addressed in the discussion below.

Metadata and its retention

The gathering of information about communications between people is not a new phenomenon. We have been foreshadowing 'total' surveillance and the death of privacy in the modern age for at least two decades (see, for example, Garfinkel 2001; Whitaker 1999). What is changing is the bulk collection, aggregation, and analysis capabilities of modern cloud computing (Macropoulos and Martin 2015: 15), and the speed with which the level of intrusiveness can move.

From time immemorial, detailed records have been accumulated on the health, morality, cognitive development, motivations, sexualities, incomes, work activities and whereabouts of certain populations ... [what *has* changed is the] significant intensification and diversification of technologically facilitated surveillance mechanisms. (Smith 2012: 1)

Governments legislating new requirements relating to metadata retention is one more step along that same path.

In the past, Australians have exhibited great respect for the limits we have placed upon government to interfere with civil liberties. There are two famous Australian legal cases that highlight our wariness of government intervention into daily life for security-related purposes. The first case is *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116. During the Second World War, the Australian parliament enacted regulations that banned the pacifist religious group Jehovah's Witnesses. However, the High Court struck down the regulations because they were unconstitutional. They exceeded the government's power, said the court, over matters to do with 'defence'.

There can be no doubt, in my opinion, that the Commonwealth is justified under the defence power in times of war in taking possession of and controlling during the war the property of organizations whose activities are prejudicial to the defence of the Commonwealth or the prosecution of the war ... but the vice of these regulations is that the consequences to a body ... are so drastic and permanent in their nature that they exceed anything which could conceivably be required in order to aid, even incidentally, in the defence of the Commonwealth. (1943) 67 CLR 116, 187 (Williams J)

The second case was in 1951, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. The Australian parliament, during the Cold War, had declared the Communist Party to be unlawful. Again, the High Court struck down the Act as unconstitutional.

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done [often] by those holding the executive power. Forms of government may need protection from dangers likely to arise from *within* the institutions to be protected. (1951) 83 CLR 1, 187 (Dixon J), emphasis added

There has thus been an historical judicial wariness of any governments limiting civil liberties in pursuit of a broad claim of 'security'. A half a century on, governments are still making the same claims on the strength of intelligence reports (not usually available to the public) and generally have the support of the Australian Labor Party (the main federal government opposition). In the last decade, we have witnessed the passage of a vast array of federal legislation (detailed below) that deals with metadata, namely access to it, operations with it, and retention of it. But unlike the 1940s and 1950s, no one is challenging the new

laws in the courts. Academics have not been so silent. The modern zeal of governments has been described by one commentator as 'hyper-legislation' (Roach 2011: 310). Indeed, Lynch, McGarrity and Williams note that

Australia is the only democratic nation without a national human rights law such as a human rights act of bill of rights. The absence of this check upon government power has had a major impact on the making and operation of Australia's anti-terrorism laws. (Lynch, McGarrity and Williams 2015: 211)

Legislation

The first tranche of legislation came in the form of amendments to *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) (Rodrick 2009). The provisions found in these two Acts now combine to permit Australian Security Intelligence Organisation (ASIO) operatives to access metadata without a warrant if they are satisfied that accessing the information is 'in connection with the performance by the Organisation of its functions'.

For example, section 136 of the *Telecommunications (Interception and Access) Act 1979* (Cth) states as follows:

- (1) A person may, in connection with the performance by the Organisation of its functions, or otherwise for purposes of security, communicate to another person, make use of, or make a record of the following:
 - (a) lawfully accessed information other than foreign intelligence information;
 - (aa) preservation notice information;
 - (b) stored communications warrant information.

Moreover, by virtue of the *National Security Legislation Amendment Act (No 1) 2014* (Cth), ASIO officers and others involved in undercover operations are given an easier ride in relation to operations. They can now be authorised by the Attorney-General to engage in what is referred to as a 'Special Intelligence Operation' (SIO) in which case they have a general immunity from civil and criminal liability.

The third aspect of the new laws is the one under particular focus here: metadata retention. A few words are needed by way of background. On 24 June 2013, the report of the Joint Committee on Intelligence and Security was released. The Committee made 43 recommendations. It paid particular attention to the mooted idea that telecommunications data be stored for up to two years in case it is required by law enforcement or security agencies. The Committee noted that, while a data retention scheme would be of 'significant utility' to national security agencies, it also raised, it said, fundamental privacy issues. In the end, the committee did not make a recommendation on the subject. It formed the view that a data retention policy must be a decision of government, and it was not for the committee to determine what the government should do.

The (former) Abbott government did indeed, however, move on this matter, and introduced the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth) into the Australian Parliament. The bill required telecommunications companies to retain metadata for two years to enable access by ASIO, the Australian Federal Police (AFP) and other federal, state and territory agencies if they need the records. This would include, for example, government departments, law enforcement agencies, crime commissions, corruption watchdogs, customs agents, and corporate regulators. In the parliamentary discussion that followed, Greens Senator Scott Ludlam, a fierce critic of the scheme, foreshadowed dire consequences:

Access to private communications records is already out of control in Australia, with telecommunications regulator the ACMA [the Australian Communications and Media Authority] reporting 580 000 warrantless demands in the last financial year. Mandatory data retention simply adds warehouses full of new private information to this broken access regime. I am not one who believes that if this bill passes into law, we will wake up on the following day in an authoritarian dystopia. Things are rarely that simple. But in the few years I've been working up close to Government, I've learned one important lesson: Governments cannot be trusted. This Government, the one before it, the one that will come after it. (Ludlam 2015)

On 26 March 2015, the bill passed into law and the Act became operative seven months later on 13 October 2015.

Concerns about the expansion of metadata retention laws generally

There are a number of concerns about the legislation. They are listed in the following paragraphs. The key concerns are that the legislation creates a surveillance regime that is very expensive, has caught telecommunications companies unawares, jeopardises privacy in an unwarranted fashion, erodes civil liberties, and may even not work. Moreover, there may be unforeseen consequences such as the leakage of data to other nations, and a counterproductive backlash in the communities most likely to be targeted. Let us examine each of these concerns in turn.

Concern 1: The high cost

As shown by the budget papers, data retention does not come cheaply. The total cost of the new measures is estimated at A\$450 million. The expenditure was framed by the former treasurer, Joe Hockey, on budget night (12 May 2015) as an appropriate response to terrorism. Tony Abbott, the former Prime Minister, was quoted as saying: 'To help combat terrorism at home and deter Australians from committing terrorist acts abroad, we need to ensure our security agencies are resourced properly and have the powers to respond to evolving threats and technological change' (Grattan 2015).

The Australian budget (2015-2016) lists the following items to bring about the legislative intent:

- A\$296 million for lifting government information technology (IT) capabilities;
- A\$131 million for IT companies to upgrade their hardware and software to accommodate the extra storage of metadata;
- A\$23 million to the Australian Crime Commission (ACC) and the federal Attorney-General's Department to implement the plan.

The question of whether these costs are justified is a matter for Australian voters. In considering the opportunity costs, one might ask what other government priorities cannot now be met given the significant expenditures on metadata retention implementation and on-going requirements.

Concern 2: Telecommunications companies are not necessarily on side nor in a state of readiness

The changes foreshadowed by the legislation put great obligations on telecommunications companies to secure their assets, and to deliver documents or information whenever requested by the Attorney-General's Department. The telecommunications companies themselves have agreed to spend an extra A\$131 million of their own money to meet the requirements under legislation. The CEO of the telecommunications lobby group Communications Alliance, Mr John Stanton, has been quoted as offering these reflections:

We think it's adding unjustifiably, significant additional and intrusive powers to government, when a more collaborative approach might be a better alternative. There's

no actual requirement to consult with the service provider that's about to be hit by this order and there's no apparent right of appeal against these sorts of decisions. We think the balance has been a bit lost there. (Australian Broadcasting Corporation [ABC] 2015b)

These concerns indicate that there is more work to be done in shaping and moulding the public/private partnerships required by the new law.

Moreover, as reported by the ABC on 13 October 2015, a survey sent to ISPs (Internet Service Providers) by the Communications Alliance revealed that two-thirds of them were still not entirely sure what type of metadata the government wants retained, collected and stored. 84 per cent were not ready to retain and encrypt the data as required by the Act. Almost two thirds of ISPs will request exemptions from various parts of the legislation, for example, the requirement to encrypt retained data. Mr Stanton was reported as saying to the ABC, "The vast majority [of ISPs] are saying "We're trying, but we are not there yet"" (Ockenden 2015).

Concern 3: The threats to privacy

There is little doubt that any legislation that broadens the capacity of governments to increase their surveillance of the population threatens the privacy of individuals (Choo 2010, 2014; Choo and Sarre 2015; Sarre 2008, 2014a; Wahlstrom, Roddick, Sarre et al 2009). To maintain one's dignity, one must be able to control access to their sensitive data (in this case, metadata) and be protected against unwanted scrutiny and judgement in private or in public.

Grounded in this rationale is the entitlement to anonymity, which should ensure that encounters with others in public remain at arm's length and that a person is subjected to only fleeting and impersonal appraisal. Like all privacy-related claims, anonymity is of particular value in fending off the controlling powers of the state. (Larsen 2011: 185)

Moreover, under Section 6(1) of the *Privacy Act 1988* (Cth) 'personal information' is defined as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable...'. These words limit the scope of the application of privacy legislation with respect to data retention because the Act will not apply to the use of algorithms that assess anonymous data (De Zwart, Humphreys and Van Dissel 2014: 718).

Concern 4: The threats to civil liberties

On the one hand, metadata retention could be explained as a useful tool in the crime prevention (especially anti-terrorism) armoury as it places useful data in the hands of those who can use it to detect unlawful planning for terrorist activities. The key proponent of the scheme, Attorney-General George Brandis, is quick to point out that concerted intervention to prevent terrorism is needed, given the potential for great loss of life.

This is not like the ordinary criminal law where it's about punishing the guilty. This is about anticipating so as to avoid mass casualty terrorist attacks. (ABC Radio 2014 cited in Lynch, McGarrity and Williams 2015: 196-197)

The proponents of the law are also quick to assure naysayers that the law demands strict controls on those who keep the data along with appropriate protections for those who see anything untoward happening regarding its collection, storage and use (for example, protections for whistle-blowers).

On the other hand, it has been argued that these laws 'erode the very democratic freedoms that they are designed to protect' (Lynch, McGarrity and Williams 2015: 219). These authors point out that the over-reach of these laws undermine Australian freedoms to a far greater extent than the laws of other

comparable nations (Lynch, McGarrity and Williams 2015: 2). Indeed, the Court of Justice of the European Union has recently stated that a citizen's right to privacy must not be sacrificed in an attempt to prevent serious crime and terrorism (European Court of Justice 2014; Nyst 2015).

These concerns have been echoed at the highest levels in Australia, too. Australian Human Rights Commissioner, Professor Gillian Triggs, was reported as saying (on 6 June 2015) that metadata retention laws that are an expansion of 'discretionary, often non-compellable ministerial powers' are a threat to democracy. Moreover, Professor Triggs added,

Respective governments have been remarkably successful in persuading parliaments to pass laws that are contrary, even explicitly contrary, to common law rights and to the international human rights regime to which Australia is a party. (ABC News 2015c)

This is a matter of considerable concern. Any regime, such as a data retention regime, is amenable to expansion through ministerial discretion and regulations that do not need to be put up for parliamentary scrutiny. The allied phenomenon of 'mission creep' (a phenomenon where an early success breeds more ambitious attempts, and before long something that was never intended becomes the status quo) immediately comes to mind (Collins 2014).

Concern 5: Metadata requirements can be side-stepped or avoided

Is metadata retention 'future proof'? That is, will the data continue to be available and useful given the ingenuity of wrongdoers to defeat the system? There are concerns that a person might use a device that cannot be traced to the sender, or a virtual private network (VPN) that will allow encryption (Berg 2015), or a secure drop system based on 'Tor' (Branch 2015). The encrypted messaging app 'Wickr' likewise circumvents data retention, as it is a United States-based service whose metadata is not captured by Australian telecommunications companies. It also uses encryption it claims is uncrackable (Grubb 2015). However, according to the experts, it is unlikely that law enforcement agencies would tolerate such a gap in their capabilities and that further legislation might be needed (Branch 2015).

Concern 6: Lack of control of international use of the data

How can we control data that is shared by us with agencies outside of Australia? The 'Five Eyes' countries — the USA, the UK, New Zealand, Canada and Australia all share their collected intelligence data. The security concerns are heightened when one considers the numbers of people who will have access.

International rules governing the trans-border gathering of evidence, 'mutual legal assistance', are poorly suited to cloud-based processing activities, as with other forms of computer and networking environments. Reforms have taken place over the past 10 years to try to improve the situation, especially through resort to more informed interstate mechanisms, based on harmonized legal systems as well as building trusted networks of [law enforcement access] experts. The primary concern with greater reliance upon informal procedures is that of accountability; ensuring that [law enforcement] do not exceed their powers and inappropriately interfere with individual rights (Walden 2015: 310).

Concern 7: Counter-productivity

There is an argument that the laws may even be counter-productive (Lynch, McGarrity and Williams 2015: 10). Our lawmakers need to be alert to the messages being sent to selected communities by any responses that may be seen to be targeting certain groups of citizens.

[Heavy-handed laws] ... can give rise to a sense of grievance in sections of the community if members and groups believe they have been unfairly ostracised or singled out. ...

[Indeed] aspects of Australia's anti-terror laws have been almost exclusively applied to members of the Muslim community and their organisations. For example, 16 of the 17 organisations currently proscribed by the Australian government are in some way associated with Islamic goals or ideology. (Williams 2011: 1172)¹

The risks data retention poses to investigative journalism can also be considered as counter-productive. Data retention laws are particularly threatening to journalists. Without the security of one's identity (with phone tracking so readily available), sources' calls will soon dry up. No-one will feel confident about calling a journalist with information, knowing that their phone calls can be tracked (ABC 2015a). Governments are best held to account by the zeal of a free press. When officials are confident that they are not under scrutiny, it is not unfair to suspect that some will exercise their power inappropriately. When that occurs we need transparency, not silence. Governmental zeal, however justified by the pressures of the day, must be kept in check by the curiosity of a free press (Sarre 2014b).

Conclusion

Governments that introduce innovations, such as laws to retain metadata, can only be held to account if citizens who are subjected to them remain vigilant and vocal. Citizens must continue to call upon policy-makers to find the appropriate balance between required levels of surveillance for the public (and private) good, and the rights of individuals to be free from the prying 'eyes' of governments at home and abroad.

Governments must legislate in a manner consistent with expectations of modern civil society, with its members asking the following questions: Have we got the balance right? Will the measures have the effect of doing what it is said that they will do (prevent terrorism) or are there unintended consequences? And finally, are these measures worth the financial and social costs?

It is worth remembering that on 7 September 1939, at the time of the debates regarding the security required to keep Australia safe following its declaration of war on Germany, the then Prime Minister Sir Robert Menzies, addressed this very issue (Menzies 1939). Former Communications Minister (now Prime Minister) Malcolm Turnbull reflected in July of 2015 upon Sir Robert's words as follows:

Prime Minister [Menzies] was leading Australia into a war against Adolf Hitler, a foe whose march across Europe must have seemed nearly irresistible. This was an existential threat. And he introduced a National Security Bill that gave extensive powers to the Government to control the economy and much of Australia's daily life in what was to become a total war effort. His warning to the House of Representatives should resonate down the years to all of us, especially those in the party he founded. 'The greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.' (Turnbull 2015)

We, too, need to ensure that we do not sacrifice our liberty in the pursuit of a goal that is neither achievable nor affordable. Indeed, how we address the security threats we face ultimately will define our society (Wesley 2015: 22). Australians need to keep this in mind as we continue to review and debate the implementation of the metadata retention policy brought into being in 2015.

¹ Any person who joins a group currently proscribed by legislation is committing an offence. Incidentally, the 17th is the Kurdistan Workers Party.

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Police as Builders of Social Capital with Farmers: Addressing Property Theft from Farms in Victoria, Australia

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Conference subtheme: Policing diverse people and places.

Abstract

Introduced in 2011, Victoria Police Agricultural Liaison Officers (AGLOs) have expertise in rural crime and are tasked with providing enhanced responses to farm victimisation. In addition to operating in a detective capacity, AGLOs perform educative and outreach duties. Utilising a framework of social capital, this paper investigates the roles which AGLOs assume in building and strengthening relationships between police and farmers. It considers the importance of strong police-community relationships, community policing and the problem-orientated policing approach of the AGLO program. It is asserted that with further resourcing, AGLOs could concentrate more directly on building trust with local communities to allow for awareness of, and better responses to, property thefts from farms.

Introduction

Developing better comprehension of farm crime and policing responses is important: a significant proportion of farms in Australia experience crime (Barclay, Donnermeyer, Doyle et al 2001; Carcach 2002), and farm victimisation can impact 'the entire rural community and the wider agricultural industry' (McCall 2003: 1). Anderson and McCall (2005: ix) note that, in addition to direct financial costs to the Australian economy, productive farmers leave the sector as a consequence of victimisation, and there are other financial and social costs throughout the agricultural sector.

There is a dearth of literature specifically regarding rural crime, internationally (Donnermeyer, Barclay and Mears 2011: 193; Scott, Hogg, Barclay et al 2007: 1-2; Weisheit and Wells 1996: 379). Nevertheless, with regard to specific scholarly attention to the policing of rural spaces, Mawby and Yarwood's (2011) collection is instructive, Donnermeyer and Barclay (2005) highlight the difficulties faced in policing and preventing crime in rural locations, and Scott and Jobes (2007) provide an assessment of the functions, culture and conduct of rural police. Bradshaw (2007) and Haldane (2016) provide practical, personal accounts of policing in small, rural locales.

Whilst no universal definition exists for rural crime or indeed for farm crime specifically (Anderson and McCall 2005: vii; Carcach 2000: 2), it is generally understood that farm crime consists of property offences which occur on farms (such as theft, vandalism, arson and illegal hunting) and environmental offences (such as illegal dumping and drug production) (Barclay and Donnermeyer 2007: 57). Interpersonal violence is also present in farming communities (see, for example, George and Harris 2014 for a comprehensive assessment of responses to family violence in Victoria). However, policing of property theft from farms is the focus of this paper.

The Victorian Farm Crime Research Project is an ongoing endeavour to examine types, extent and locations of farm crime in Victoria, consider attitudes of farmers and farming communities to criminal justice responses to farm crime, assess existing policing practices and analyse alternatives, and determine a suite of strategies for prevention and control of crime against farms and for improvement of service delivery by the criminal justice system in Victoria. An online survey of 51 Victorian farmers conducted between October 2013 and September 2014 consisted of both qualitative and quantitative questions. This survey adapted and added to questions posed by previous farm-crime surveys (such as Anderson and McCall 2005; Barclay, Donnermeyer, Doyle et al 2001; McCall 2003) to determine types and prevalence of

thefts from farms in Victoria and added a series of attitude survey questions pertaining to perceptions of the criminal justice system and its responses. Interviews were conducted in November 2013 with seven Victoria Police members serving as Agricultural Liaison Officers (AGLOs) to obtain qualitative data. This paper considers qualitative comments provided by survey respondents and from the Head of Practice responsible for the oversight of AGLOs (space limitation precludes a more exhaustive analysis of survey results here), and will assess the role police in Victoria play in enhancing the police/farmer relationship to encourage reporting of farm crime.

Social capital

‘Social capital’ has long, sustained historical and theoretical origins, perhaps as early as Aristotle. Whilst de Toqueville pursued this concept in the nineteenth century, and Hanifan in 1916 (Halpern 2005: 3-6), incorporation of the term specifically is much more recent. In the context of the rise of economic rationalism in the 1980s, Bourdieu (1986) argued that ‘cultural capital’ and ‘social capital’ must be added to considerations of ‘economic capital’ (Halpern 2005: 6-7). Bourdieu and Wacquant defined ‘social capital’ as:

the sum of the resources, actual or virtual, that accrue to an individual or a group by virtue of possessing a durable network of more or less institutionalised relationships of mutual acquaintance and recognition. Acknowledging that capital can take a variety of forms is indispensable to explain the structure and dynamics of differentiated societies. (1992: 119)

Significant in this field is Coleman (1988: 96) who suggests that ‘[l]ike other forms of capital, social capital is productive, making possible the achievement of certain ends that in its absence would not be possible’. Perhaps the most succinct definition is provided by Putnam who suggests that:

Features of social life — networks, norms, and trust — that enable participants to act together more effectively to pursue shared objectives ... Social capital, in short, refers to social connections and the attendant norms and trust. (1995: 664-665)

There is a growing body of literature that relates social capital theories to the study of crime and policing (see Halpern 2005; McCarthy, Hagan and Martin 2002; Robinson 2003; Rose and Clear 1999). Shared norms, social habits and a ‘sense of mutual trust’ can have a downward impact on rates of crime (Halpern 2005: 129) and, it is argued here, Victoria Police’s AGLOs act as builders of social capital.

Victoria Police Agricultural Liaison Officers

A far cry from the ‘three drunken untrained men in 1834’ as outlined in Haldane’s (1986) seminal account of the emergence of this police organisation, Victoria Police is a large, modern, centralised organisation. The Victoria Police *Blue Paper* released in 2014 illustrates the ongoing transition of an intelligence- and evidence-based and future-focused organisation (Victoria Police 2014b).

Victoria Police’s Livestock and Farm Crime Specialists Group was launched in October 2011 to ‘support and improve investigations into stolen livestock and other farm-related crime’ (Victoria Police 2012: 45). In May 2012, the *Livestock Theft and Farm Related Crime Strategy 2012-15* was launched by former Police Minister, Peter Ryan, who noted that:

The strategy will focus on four key areas: prevention, intelligence, enforcement and integrated operations ... A strategic advisory group will be established to work with agencies to develop state-wide crime prevention programs for farmers and other regional Victorians. (Henry 2012; Farming Ahead Online 2012)

An important part of this strategy is a network of approximately 48 AGLOs, comprised mostly of general duty detectives and some uniformed officers located strategically around the state, coordinated by the Head of Practice for the Livestock and Farm Crime Specialist Group, Superintendent Craig Gillard. Police members are selected to be AGLOs based on their 'knowledge, skills and expertise to deal with livestock theft and farm-related crime' (Victoria Police 2012: 45). A central information hub provides AGLOs and other police members with access to information. Senior officers are advised by a Strategic Advisory Group which includes representatives from the Victorian Farmers Federation (VFF), Department of Primary Industries and the Municipal Association of Victoria (Victoria Police 2012: 45). The AGLOs themselves conference bi-annually, and some attend conferences convened by interstate colleagues (Gillard 2013a: 1).

Almost all AGLOs are detectives at divisional crime investigation units, and responsibility for specialist farm crime investigation is but one of their many portfolios. Generally, they are police who possess some industry knowledge who '[m]ight come off the farm ... might have a small farm themselves' (Gillard 2013b). AGLOs self-nominate for the role and their background is assessed: 'If it's good', Gillard notes, 'we bring them on. We try to get a pretty broad cross section'. He also observes that, since the program commenced, there is significant interest from the police membership from those with relevant rural and industry skills.

The AGLO program was not modelled on any particular rural policing squad. Rather, it originated from discussions within the industry and with government and police. Gillard (2013b) points to an increase in crime at the time. This led to key stakeholders and the government approaching Victoria Police which suggested '[w]e need to have a look at how we go about this, and that's why we refocused and structured up the way we did.' This model differs from comparable sections in other police organisations. New South Wales have Rural Crime Investigators, rural-based detectives whose almost exclusive focus is livestock; Queensland has a Stock and Rural Crime Investigating Squad with a primary focus on stock theft, although there is growing attention to other incidents of farm crime, such as firearm theft, rural offending by organised criminal networks, and animal activism (Gillard 2013b).

Developing mutual trust

Among the tasks performed, AGLOs provide information to farmers regarding crime prevention measures which could be adopted, encourage greater reporting of crime, and engage with key stakeholders, such as stock agents when dealing with thefts of livestock (Loncaric 2012: 8-9). Indeed, the building of trust with local communities is a significant element of the role. On this issue, Robinson (2003: 657) notes that the trust people have in each other or in a group 'has been an important dimension of the social capital construct' and highlights the work of Fukuyama who places trust centrally in his consideration of social capital (1995: 26). She points to Pino's (2001) research, too, which found that a lack of trust in police significantly impacted attempts to reduce crime.

Social capital is important to consider in a study of rural policing: a significant explanation offered by farmers for non-reporting of farm crime is a concern as to whether the police will take reports seriously. Some farmers always report crime. One farmer, for instance, maintained that: 'I believe get the record down even when the rest of the process is a shambles, sometime in the future the info could be helpful'. Others, however, are concerned and perhaps deterred by perceived insufficiencies in police presences and policing responses. Indeed, scepticism about the willingness or ability of police to act is nominated as a reason not to report. One farmer noted that: '[p]olice have conflicts of interest and protect people known to them in the community' (Victorian Farm Crime Survey 2014).

Several respondents to the Victorian Farm Crime Survey (2014) noted that, whilst they see police performing traffic roles in their communities, they see little outcomes in terms of theft recovery and prosecution, and that 'farm crime is probably the least of their worries'. Some speculated that drugs,

family violence and 'urban issues' occupy the bulk of police time. In addition to a reactionary law enforcement role, police engage in proactive initiatives to prevent crime. Nevertheless, this work is not always obvious. There exists here, too, a high degree of cynicism. Two farmers' perspectives — that 'cops don't do nothing' and 'nothing is being done, but don't expect it to be either' — highlight this (Victorian Farm Crime Survey 2014). Similarly, 32 per cent of the 1251 farmers surveyed by Barclay (2015) in New South Wales and Queensland indicated that '[p]olice can't (or won't) do anything' was a reason for non-reporting of farm victimisation.

Mawby's (2004) analysis of perceptions of police in Cornwall in rural England discovered that rural residents are often critical of the number, and inaccessibility, of police. In another rural English study, Jackson and Sunshine (2006: 214) observe a link between trust and confidence in police and evaluations of 'the values and morals that underpin community life' (see also see Murphy, Mazerolle and Bennett 2014; Nix, Wolfe, Rojek et al 2015). In Victoria, the need for a stronger, more obvious police presence 'rather than one man stations that close at 5pm', 'being visible in the community', and an urging for police to 'take the matter more seriously, increase police presence in area' are typical of comments made by farmers (Victorian Farm Crime Survey 2014).

'Social capital is interactive', Flora and Flora (2008: 117) declare, and is built through norms being reinforced by communities (not individuals in isolation) forming groups, collaborating within and with other groups, having a shared future vision, forming and reinforcing collective identity and engaging in collective action. Social capital is built, they argue, by relationship strengthening and communication, and is essential if small communities are to thrive (Flora and Flora 2008: 118; 137). When launching the AGLOs, Ryan observed that a collaborative approach to farm crime is critical:

[I]livestock theft is a unique crime that requires investigative skills and a good partnership between government, police and agricultural groups to catch those responsible. I would say farm theft is in the same category. (2011)

Victoria Police also identify the importance of partnerships and relationship building. The 2013-14 *Annual Report* (Victoria Police 2014a) notes that: 'The police response also encompasses crime prevention and building partnerships with the farming community and other organisations'. The President of the VFF in 2012, Ian Feldtmann (Henry 2012), similarly discerned the value of having a local point of contact between farmers and police:

Success in this area is always going to be a two way street, and it's fair to have expectations from policing, but members of the farming community also have to be proactive in relation to being vigilant and reporting crime and suspicious behaviour as a matter of urgency.

Trust and confidence in police by the public is critical in encouraging citizen participation, ensuring accountability and responsiveness and enabling public cooperation with police and compliance with the law (Jackson and Bradford 2010). It is argued here that building a strong relationship between community and police in rural settings is as critical as in urbanised communities, yet there are barriers to trust being established. Donnermeyer and Barclay (2005: 7) note that the characteristics of individuals and groups in farming communities influence police responses. Non-reporting of crime can present a significant issue for police in terms of obtaining information, investigating crime, bringing about successful prosecutions and targeting resources appropriately. There is, therefore, a strong impetus to build trust with farming communities. Engaging with farmers, though, can be difficult for police. Gillard (2013b) makes two pertinent observations regarding this. First, junior police members, no matter how diligent they may be, will struggle to engage with farmers if they have little or no industry knowledge. Fortunately, he notes, AGLOs have good connections with farmers and farming communities and

organisations which can break down initial barriers. Second, building trust between police and farmers can, Gillard acknowledges, be difficult:

[Farmers are] not the easiest group to interact with about — they don't like talking about their livelihood too much. They are closed books until something happens ... Very good people, great people, I come from a rural area myself, but they won't tell you everything ... It does take a while. They've got to know and trust and all that sort of thing. Just got to have good strong relationships and that's what the AGLO program's about — for them to have relationships within their community, and over time become known. Some of these people [AGLOs] are really active and do a great job both in a reactive sense and a proactive sense.

A strong relationship can be beneficial for farmers and police alike. For the police, Gillard (2013b) says, it can lead to the provision of information which they might not otherwise have accessed:

These guys [two particular AGLOs] are in the farming community themselves and are well known and [a farmer will think] 'I'll give Jack a ring about this — a quick head's up'. That sort of stuff. That's a real positive and that's why we're willing to go with it. Just keep building on that so that they know that the program is working, that there's some people around with really good industry knowledge that can help you. That's the key.

Community and problem-orientated policing

'An invocation rather than a prescription' as Bayley (1989: 78-79) describes it, community policing emerged in the United Kingdom in the 1970s and constituted a significant shift away from a traditional, authoritarian policing model. Although met with initial ridicule, it has come to be viewed by the public and decision makers as a 'good thing' (Williamson 2005: 153). Defining the terms 'community' and 'policing', though, is fraught and Williamson (2005: 153) points to the views of Tilley (2003: 315) who argues that:

[t]he 'community' of community policing is elusive and may in many cases be illusory. Ironically, those least likely to take part in it are just those whose disaffection with the police lay behind many of the calls for community policing.

Yarwood (2015) provides a critique of the application of 'community' with rural policing and advocates a reconceptualisation of rural policing. He argues that rural communities are complex and that 'the study and practice of community-based policing must similarly recognise this complexity' (Yarwood 2015: 285). In an Australian context, Baker and Hyde (2011: 152) note that with no easily determined homogeneity of states, regions and localities, a clear definition of community is not possible.

We can accept broadly that community policing focusses on partnerships between police and the communities they serve with an enhanced focus on forming collaborative relationships in contrast with a traditional policing model based on crime fighting and enforcement (Fleming 2010: 2), and focussed, amongst other functions, on upholding the law, preserving the peace and responding to emergencies (Baker and Hyde 2011: 155). There exists an international body of literature devoted to the merits of community policing approaches (see, for example, Burke 2010; Mishra 2011; Palmiotto 2011).

This model of policing is, in essence, a return to the past: a recalibration of the second of Sir Robert Peel's key principles — 'to recognise always that the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour, and on their ability to secure and maintain public respect' (Emsley 2014: 13). In an Australian context — and with a focus on rural policing — Putt (2010: 37) highlights that police 'must build community networks and local knowledge ... in order

to engender respect for being well-informed and acting fairly and appropriately'. Research has also consistently shown how police in rural places are less likely to initiate formal actions against perceived infractions (see, for example, O'Connor and Gray 1989). Putt (2010: 37) notes, though, a tension between community engagement and delivering core policing functions, and that (citing Myhill 2006) whilst the exercise of discretion by police is profoundly important, it:

is more likely to be exercised in rural and remote settings in ways that are influenced by local knowledge and how an officer is part of the local community. There is the risk that problem solving approaches adopted as part of community engagement may have the unintended consequence of exacerbating divisions and conflicting interests within communities.

Putt (2010: 38) also notes the existence of barriers to community policing, such as the need to confront local politics and for there to be organisational and local community support. She argues that rural-based police have traditionally been generalists, with the exception of dedicated units mandated to address specific issues such as livestock theft, but that '[m]ore innovative approaches may be required to work with social groups through communities of interest and facilitated by new communication tools' (Putt 2010: 39).

Often when a crime problem is identified, provision of additional resources (such as greater police numbers, new equipment and additional training) is viewed as a panacea. However, collaborative policing initiatives, where police are better integrated with the communities they serve, and non-monetary measures, such as reducing alienation between police and the citizenry, can be greatly beneficial (Ankony 1999). Ankony (1999: 150) argues that:

it is crucial that officers feel closely integrated with the majority of citizens in the community they serve. Typically, this means that officers perceive themselves as sharing important community values and beliefs and being confident of community support in the decisions they make.

Problem-orientated policing (POP) — a variant yet distinctive form of community policing — originated in 1979 when it became apparent that crime prevention and control were being neglected by law enforcement agencies (Drew and Prenzler 2015: 100; Tilley and Scott 2012: 122). In essence, POP is a strategic, problem-solving policing approach aimed at improving the focus of police by 'encouraging unique and innovative solutions to problems' (Drew and Prenzler 2015: 85). Problem-solving 'cannot be undertaken without community partnership' (Drew and Prenzler 2015: 88).

'POP is a guiding framework', Drew and Prenzler (2015: 101) note, 'that incorporates problem solving, providing police with a process that facilitates better analysis, understanding and responses to crime and disorder' (see also Scott 2000). Given that farming communities are spread across the state of Victoria, rather than concentrated on one particular area specifically, the AGLO program adopts a POP approach. The AGLOs gather information, intelligence and evidence from the field which is then assessed and analysed centrally to detect trends and to inform policy positions and strategic policing responses to thefts from farms. POP also incorporates notions of police professionalism, providing opportunities for police to 'acquire extensive local knowledge and networks that can and should be utilised for order maintenance and crime prevention' (Brown and Sutton 1997: 22). This is most certainly true of the AGLO program which not only strategically considers intelligence garnered but also seeks to build social capital with farming communities.

AGLOs as builders of social capital

Social capital is comprised of 'bonding social capital' — 'connections among individuals and groups with similar backgrounds' — and 'bridging social capital' — which 'connects diverse groups within the community to each other and to groups outside the community': a dichotomy similar to Tönnies's *Gemeinschaft/Gesellschaft* social groupings (Flora and Flora 2005: 125). Jackson and Wade (2005: 51) argue that proactive policing techniques emanating from 'tough on crime' (in an urban context, at least) 'perpetuates and exacerbates the social distance rift between police and their community', and that whilst numerous explanations are offered for the proactive behaviour of police, social capital explanations are the least developed.

Specialised liaison officers can potentially bridge the social capital between police and rural communities. Willis (2010: 42), in his consideration of the role and effectiveness of Aboriginal Liaison Officers, notes the core functions as building good communications and relations, resolving disputes, improving comprehension of the role of police, working together on implementing crime prevention solutions, and identifying local crime problems. Victoria Police's AGLOs can — and do — act as agents of change and as builders of social capital. AGLOs have expertise in rural crime and provide additional attention to crime on farms, which might not otherwise occur, by performing detective work on farm-related crime.

AGLOs also perform a community-engagement and educative role: these functions provide valuable enhanced social capital for farming communities. Provision of additional resourcing would allow AGLOs to concentrate more fully on building trust with local communities without the distraction of other general duty tasks. Greater detailed analysis, assessment and review of rural crime, and the alleviation of inequalities existent between policing responses in urban compared with rural areas, are also critical developments which must occur if thefts from farms are to be tackled successfully.

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Who's Missing? Demographic Impacts from the Incarceration of Indigenous People in the Northern Territory, Australia

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Conference subtheme: Current issues in Indigenous justice

Abstract

The release of the 2014 *Social Justice and Native Title Report* by the Australian Aboriginal and Torres Strait Islander Social Justice Commissioner again emphasised the significant over-representation of Aboriginal and Torres Strait Islander people in prison. Shortly after, the latest Australian Bureau of Statistics data on prisoners in Australia showed there were 1494 inmates incarcerated in the Northern Territory (NT) in 2014, of which 85.6 per cent were of Aboriginal or Torres Strait Islander origin, the highest proportion of all states and territories. Many of these inmates are thought to originate from small and remote communities and, with significant numbers of Indigenous men and women in prison in the NT, there is a range of potential impacts for individual communities including social, economic and demographic. This research focuses on the demographic impacts for individual remote communities using a variety of secondary data and applying statistical techniques to highlight the range of impacts at community levels. The results demonstrate that with up to 14 per cent of men and 2 per cent of women being away at any given point in time due to incarceration some communities are significantly affected by the absence of residents in jail.

Introduction

In December 2014, the Australian Broadcasting Corporation (ABC) reported on the release of the latest *Social Justice and Native Title Report* by the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda. The report emphasised the substantial and increasing over-representation of Indigenous people in prisons. For example, from 2000-2013, the imprisonment rate for Aboriginal and Torres Strait Islander adults increased by 57 per cent while the non-Indigenous rate remained fairly stable (Kidd 2014). Gooda called this development 'one of the most urgent human rights issues facing the nation today', leading to 'knock-on effects in Indigenous communities' and having become 'an inter-generational problem' (Kidd 2014).

Moreover, Gooda referred to the *National Indigenous Reform Agreement* (Council of Australian Governments (COAG) 2011), remarking, 'We have a whole range of targets in the Closing the Gap strategies and the one missing, in my view, is one on justice' (Kidd 2014). In December 2007, COAG signed a partnership agreement to work with Indigenous communities to achieve the target of Closing the Gap between Indigenous and non-Indigenous Australians (COAG 2011). The main targets outlined in the *National Indigenous Reform Agreement* (COAG 2011) comprise specific performance indicators that were last reviewed in 2011. Targets include life expectancies, early childhood, schooling, health, economic participation, healthy homes, safe communities, and governance and leadership. There is, however, no direct target relating to social justice.

Overview of Indigenous imprisonment in Australia and the NT

When it comes to information related to prisoners and imprisonment in Australia, a variety of data sources are available. These include, but are not limited to, the Australian Bureau of Statistics (ABS) Prisons Census, the ABS Corrective Services Australia publication, the ABS Census of Population and Housing, and the National Aboriginal and Torres Strait Islander Social Survey (2010). Combined, these data allow us to present an overview of the current situation of Indigenous incarceration in Australia.

Comparing the age standardised imprisonment rates of adult prisoners (aged 18 years and older) across Australia in 2014 shows the highest Indigenous imprisonment rate per 100 000 people was in Western Australia (3013 per 100 000 adult population), followed by the Northern Territory (2390 per 100 000 adult population) and South Australia (2016 per 100 000 adult population) (ABS 2014). Figure 1 demonstrates these rates as well as the particularly high proportion of Indigenous people compared to non-Indigenous people.

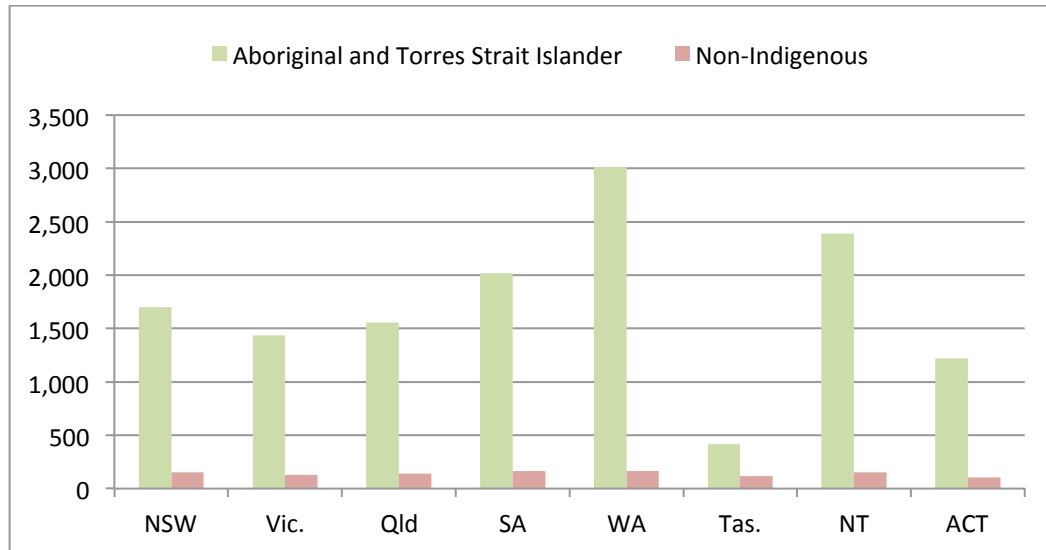


Figure 1: Age standardised imprisonment rate across Australia (per 100 000 adult population) (ABS 2014).

Time series data from the 2014 ABS Prison Census provides an age standardised rate for Indigenous prisoners (Figure 2). The data highlights the continuous growth in incarceration rates for Indigenous people, in both the NT and Australia as a whole, with the NT showing a substantially higher rate of increase since 2010. The highest recorded Indigenous incarceration rate in the NT was in 2014 at 2390 per 100 000 adult Indigenous people.

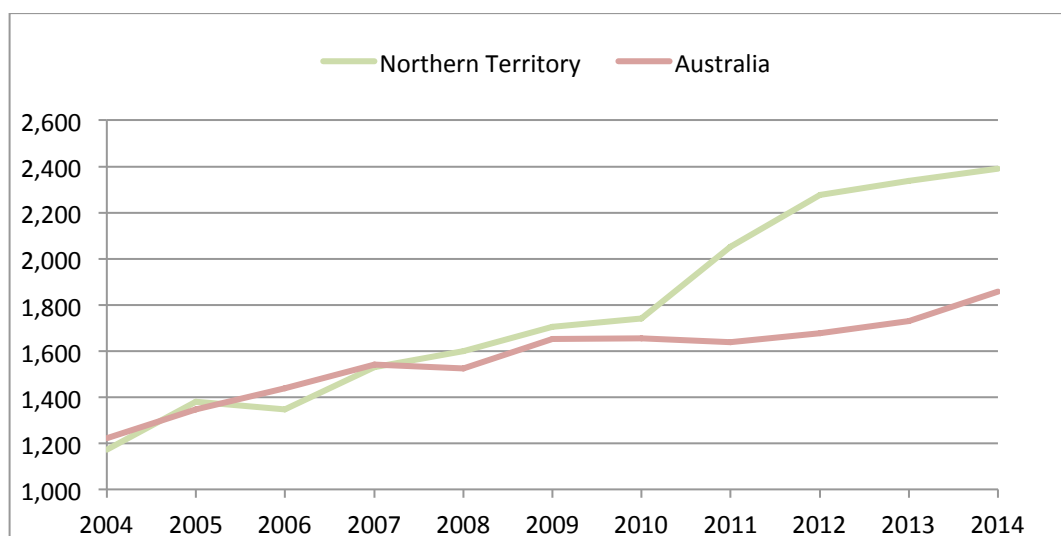


Figure 2: Age standardised Indigenous imprisonment rates (per 100 000 adult population), 2004-2014 (ABS 2014).

If we consider the ratio of Indigenous to non-Indigenous imprisonment numbers from 2004 until 2014, a similar picture arises (Figure 3). In 2004, there were 9.5 Indigenous prisoners for every non-Indigenous prisoner in Australia as a whole, climbing to 12.9 by 2014. In the NT, the comparative ratios were 8.3 in 2004 and 15.4 in 2014. This suggests over-representation of Indigenous people has increased by 50 per cent for Australia as a whole, and nearly doubled for the NT.

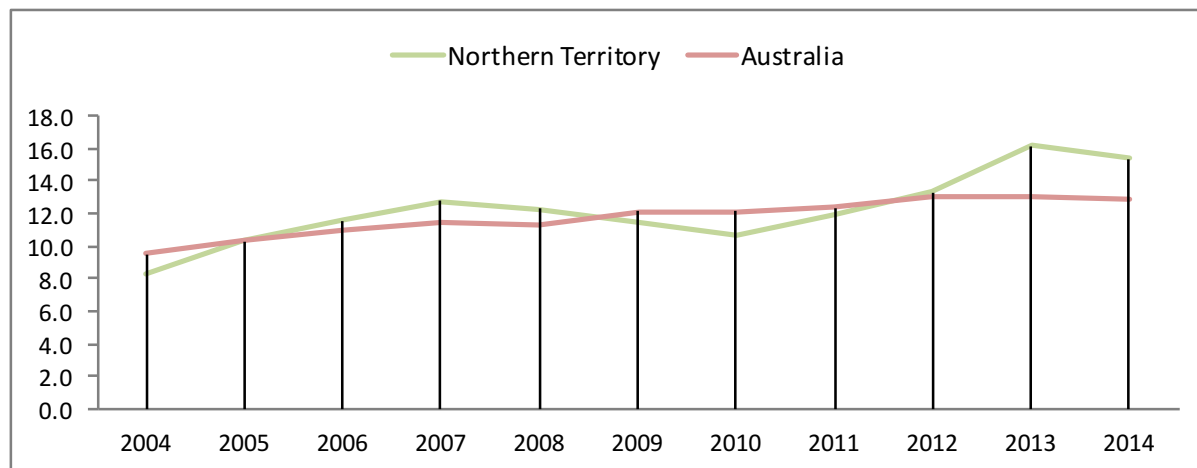


Figure 3: Ratio of Indigenous to non-Indigenous imprisonment, 2004 to 2014 (ABS 2014).

A profile of prisoners in the NT

The latest ABS information from the National Prisoner Census on prisoners held in custody in Australian adult prisons on 30 June 2014 allows us to profile the characteristics of prisoners held in the Northern Territory. In the NT, there were 1494 inmates (18 years and older) incarcerated at this particular point in time, of which 85.6 per cent were Aboriginal or Torres Strait Islanders, the highest proportion in the country.

The prevailing reason for incarceration in the Northern Territory in that year were 'Acts intended to cause injury' (53 per cent), 'Sexual assault and related offences' (12 per cent) and 'Homicide and related offences' (8 per cent). Noteworthy, 'Offences against justice procedures, government security and operations' followed closely behind homicide with 7 per cent (ABS 2014).

Standardising the 2014 Prison Census numbers by age and Indigenous status shows that, although 2.9 per cent of all Indigenous Territorians (aged 18 years and older) were in jail (compared to 2.2 per cent in Australia as a whole), the imprisoned share for some specific age groups was much higher for both the NT and for Australia. Figure 4 illustrates age and gender rates of Indigenous incarceration in the NT in 2014 compared to the rest of Australia. The data demonstrates the significantly higher proportion of Indigenous males in prison in the NT for every age group, and for males and females compared to the rest of Australia. Female incarceration rates are much lower than male rates for every age group; however, only in older age groups (greater than 45yrs) are NT females incarcerated at a rate higher than the rest of Australia. The proportion was especially high for Indigenous male Territorians aged 35 to 39 years, at 8.1 per cent of all Indigenous residents in that age group. For the rest of Australia, the highest proportion of incarcerated Indigenous males was in the 30 to 34-year age group at 6.5 per cent.

The age and gender distributions for Indigenous and non-Indigenous prisoners in the Northern Territory are compared in Figure 5. The median age for Indigenous males in prison in the Territory was 32.5 years, compared to 36.9 for non-Indigenous. The median age for Indigenous females in prisons in the NT was 33.2 years in 2014, although there was a cluster of nearly a quarter of Indigenous females in prison aged 25-29 at that time.

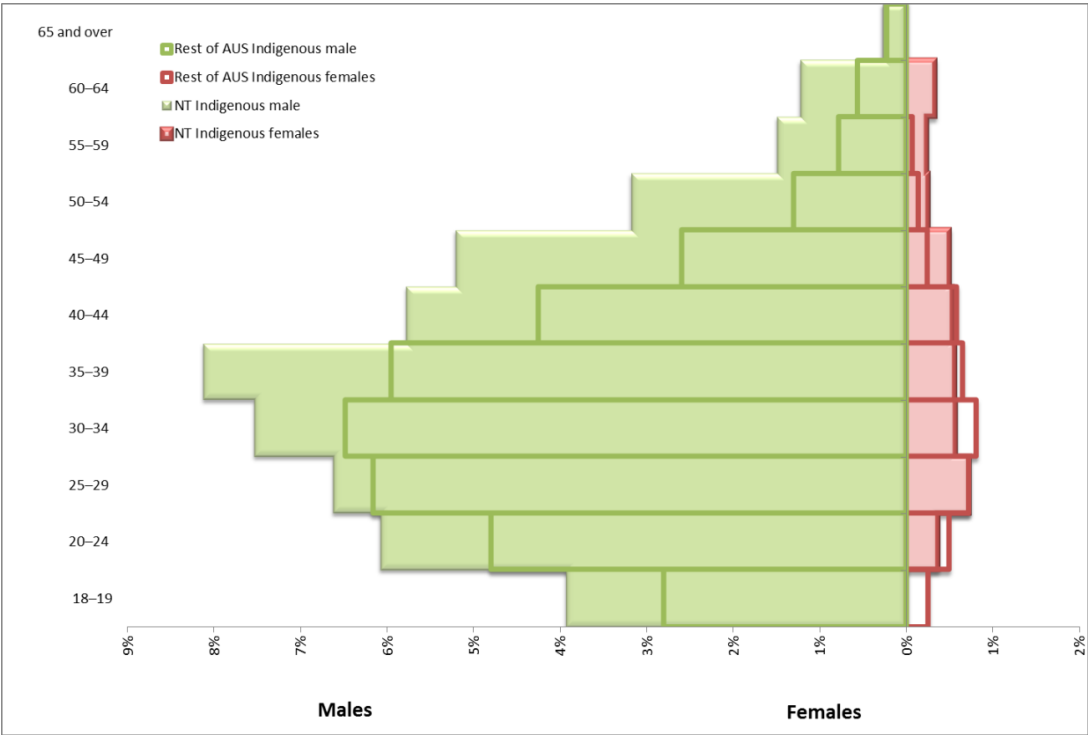


Figure 4: Proportion of Indigenous people in the NT and rest of Australia incarcerated by age and gender, 2014 (Author’s calculations based on ABS 2014; NT Department of Treasury and Finance 2014).

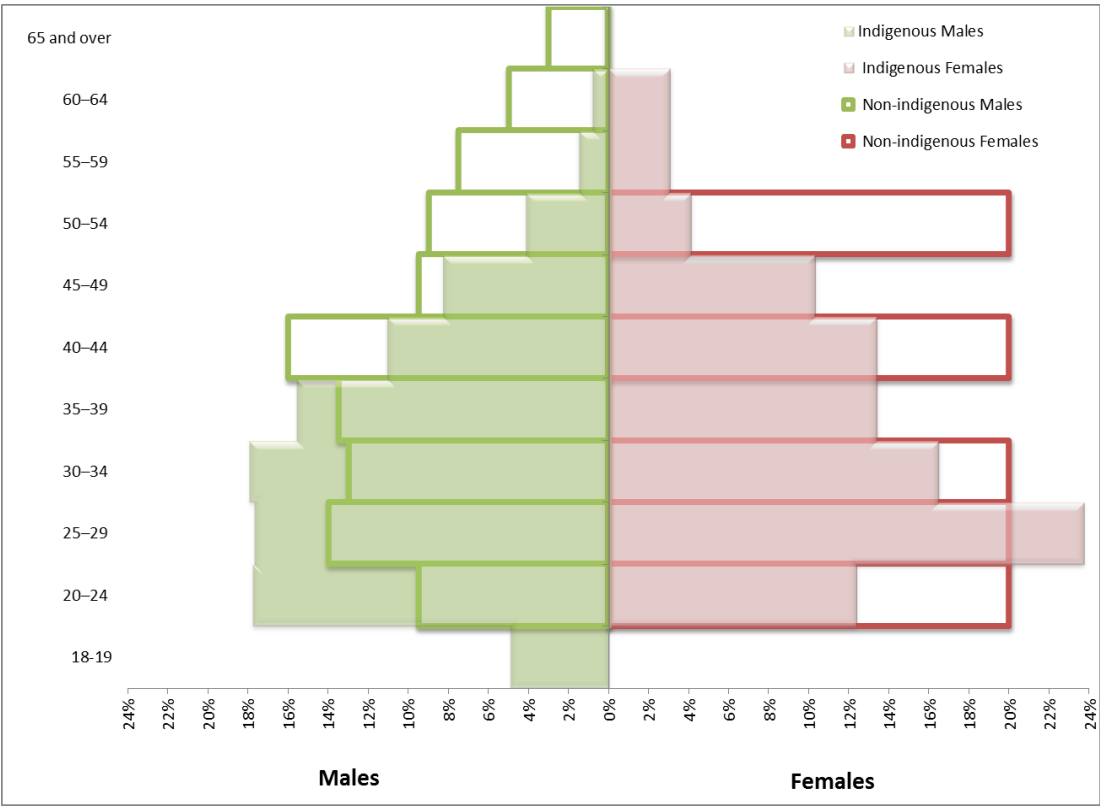


Figure 5: Age-Gender distribution between Indigenous and non-Indigenous prisoners in the NT, 2014 (ABS 2014).

With the significant number of Indigenous men and women in prison in the NT at any given point in time, there is a range of potential impacts for individual remote communities including social, economic and demographic. In this paper we focus on the latter, on the basis the imprisonment data represents significant numbers of men and women 'missing' from individual communities at any point in time. We commence by discussing the current body of international knowledge on community and social impacts from imprisonment with a focus on Indigenous people and communities before applying statistical techniques to demonstrate the sorts of demographic effects a community of average demographic structure might experience.

Current body of knowledge

While there is limited literature on the effects and impacts of the incarceration of Indigenous people in remote areas specifically, research in the broader context of Indigenous crime and justice has been conducted by others including Baldry, Carlton and Cunneen (2015), Blagg (2008), Cunneen (2001) and Edney (2002). Moreover, many existing studies are based on findings from the United States and point to general effects of maternal and paternal incarceration on children, as well as the social consequences and financial costs for concerned families and communities (for example, Clear 2008; Dawson, Jackson and Nyamathi 2012; Foster and Hagan 2013; Hagan and Dinovitzer 1999; Roberts 2004).

Hagan and Dinovitzer (1999) were among the first to summarise impacts from imprisonment by highlighting, in particular, the depletion of human and social capital resources for families and communities. The concept of social capital can be described as the social networks we find ourselves in, the exchanges that arise from them and the value of these for achieving mutual benefits in a community (Schuller, Baron and Field 2000: 1).

Meanwhile, Dawson, Jackson and Nyamathi (2012) undertook an extensive review of qualitative literature in order to detail the experiences of children and young adults of incarcerated parents in a US setting. Their findings indicated parental imprisonment effected children in several ways potentially leading to experiences of violence and abuse, stigmatisation and discrimination, early sexual activity or drug abuse, and emotional and financial stress.

Exploring the effects of imprisonment on the wider community, Hagan and Dinovitzer (1999) outline the following consequences:

- A loss of community cohesion;
- A loss of working males and consequently income;
- The diversion of funds away from schools and communities in order to cope with the increasing costs of imprisonment;
- The circumstance that, once one person is removed from the community for criminal activities, a new participant will usually take over the role.

The impacts of high imprisonment rates on communities were also investigated by Clear (2008) who examined several studies that specifically dealt with the effects of incarceration on communities in general. Clear found opportunity costs are borne by social networks in places with high incarceration rates. Young men are supposed to be entering the labor market meeting new people, thereby expanding the productive capacity of all the networks of which they are a part of, as well as bridging their personal networks to those of others. However, men in prison cannot perform this role in the free world; they can only build their networks within the domain of the prison. In line with Clear's findings, Roberts notes:

the spatial concentration of incarceration ... impedes access to jobs for youth in those (African American) communities because it decreases the pool of men who can serve as

their mentors and their links to the working world ... generating employment discrimination against entire neighbourhoods. (2004: 1294)

In the context of Australian Indigenous communities, Edney (2002) contests that social capital in Indigenous communities is particularly undermined through imprisonment. He argues the effects of imprisonment in conjunction with the numerous other social, economic and health indicators by which Indigenous communities fare poorly ensures Indigenous communities are continually fragmented. Those effects are so significant that imprisonment for Indigenous communities is foremost a political issue and, therefore, central to the content of self-determination in the post-colonial context of Australia. In this respect, Cunneen (2001) warns the accumulative effects from the criminalisation and incarceration of Indigenous people in Australia lead to the creation of a new generation of Indigenous people construed as criminal.

The literature highlights the potentially severe effect of high incarceration rates for communities, Indigenous or otherwise. The effects discussed in the literature may be magnified for remote communities since they are relatively small, concentrated and isolated. Given the order of magnitude in the rates of Indigenous imprisonment in the NT and elsewhere compared to non-Indigenous residents, this represents a worsening situation in Australia. In the following, we focus on calculating the possible demographic effects for NT communities.

Who's missing?

Based on the effects from imprisonment which are outlined in international literature, the following research questions were posed:

- What proportions of Indigenous men and women are away in prison from remote communities in the NT at any point in time? and
- What does this number consequently mean for the demographic fabric of small remote communities in the NT?

Since no Australian datasets record a reliable 'home community' or 'pre-prison address' these questions cannot be tackled directly, requiring an indirect and indicative approach. For the purposes of this analysis we use the Poisson distribution, a statistical probability distribution describing the behaviour of simple random events. For our analyses we have chosen to explore the number of people (both men and women) aged 20 to 39 years who might typically be 'missing' from communities at any one time, since the Prison census shows most prisoners fall into this age category. We then relate the findings from the Poisson analysis to the types of demographic such communities might experience.

This study does not focus on any particular community, but instead estimates the likely impacts for a 'typical' community of 'average demographic structure'. While we understand communities are diverse in population and other characteristics, the choice of method is to illustrate the issue as one which affects all communities. In the absence of community level data, the Poisson method is suitable for these aims and its application is described in the following section.

Methodology

In order to obtain a Poisson distribution, we let the total number of males and females in this age range in NT communities be T with P of them in prison. Consequently, the percentage of the population of 20 to 39 year old males/females in communities which are in prison is $M = (P/T) \times 100$.

In a next step we take into account the average community size (C). We assume every community has the same age-gender distribution and that there are X per cent in each community who are males/females aged 20 to 39, implying for the purpose of this analysis all 'communities' have identical demographic

structures. This means the number of 20-39 males/females normally 'living' in each community is $S = C*(X/100)$. Assuming whether or not an individual is in prison is independent of whether any other person of that community is in prison, then the number of men or women aged 20-39 in that community who are actually in prison will follow a Poisson distribution with a mean estimated by F. F can be estimated for a 'typical' community by simple substitution as

$$F = (M/100)*S = (((P/T)*100)/100)*(C*(X/100)).$$

For our purposes we can approximate the Poisson distribution with a Normal distribution. So, a Poisson distribution with mean F is approximately described by a Normal distribution with mean F and variance F. For a Normal distribution, a 95 per cent confidence interval is given by $(\text{mean} \pm 1.96*\text{sqrt}(\text{variance}))$. So for the Poisson distribution with mean F, a 95 per cent confidence interval is approximated by $(F \pm 1.96*\text{sqrt}(F))$.

To obtain the percentage of men and women missing, the following variables need to be calculated:

- C (Average size of a community),
- T (Total number of males/females between 20 to 39 years in NT communities),
- P (Total number of males/females between 20 to 39 years from NT communities in prison) and
- X (Proportion of that age group in one community).

The average size of a community (C) was determined by taking the total number of people in remote Indigenous communities divided by the number of remote Indigenous communities. This number was derived from custom built tables in ABS Tablebuilder software using the geographic unit of ILOCs (Indigenous Locations [ABS 2011]). ILOCs generally represent small Aboriginal and Torres Strait Islander communities with a minimum population of 90 Aboriginal and Torres Strait Islander usual residents. To approximately adjust for census counting errors and for people who did not state their Indigenous status, we increased the average size of a community by 19 per cent, based on the estimated net Indigenous undercount rate for the 2011 Census (ABS 2012).

The total number of males/females between 20 to 39 years in NT remote communities (T) was likewise derived from ABS Tablebuilder and adjusted upwards by 19 per cent.

The total number of males/females between 20 to 39 years from remote communities in prison (P) were estimated by first dividing the total number of males/females in that age group in remote communities by the total number of Indigenous males/females in the NT. We then assumed this proportion is similar to the proportion of males/females from remote communities being in prison and P was calculated by taking the 2014 ABS Prison Census data of Indigenous men/women in that age group in prison multiplied by the proportion of males/females living in remote communities.

The proportion of males/females between 20 to 39 years old in one community (X) was determined by dividing the average number of males/females in that age group by the average size of a community.

Results

The calculation of the variables results in the following formula for estimating the average number of men missing at any point from an average sized community:

$$F = (((611/6831)*100)/100)*(343*(16/100)) = 4.91$$

The 95 per cent upper (u) and lower (l) confidence interval is calculated as:

$$\begin{aligned}CI(u) &= 4.9087 + 1.96 * 2.2155 = 9.25 \\CI(l) &= 4.9087 - 1.96 * 2.2155 = 0.57\end{aligned}$$

Consequently, we can say on average between 4 per cent and 14 per cent of men aged 20 to 39 years are away from their community and in prison at any given point in time.

The final formula for calculating the average number of women away from their communities is:

$$F = (((51/7380) * 100) / 100) * (343 * (17/100)) = 0.40$$

The 95 per cent upper and lower confidence interval is calculated through the same formula as above:

$$\begin{aligned}CI(u) &= 0.4029 + 1.96 * 0.6347 = 1.65 \\CI(l) &= 0.4029 - 1.96 * 0.6347 = -0.84\end{aligned}$$

Thus, the approximate number of women missing from an averaged sized community is between 0 per cent and 2 per cent, since the Poisson distribution does not allow a negative count.

Discussion and conclusion

We have highlighted the increasing rates of incarceration for Indigenous people in the Northern Territory and outlined some of the potential social, economic and demographic impacts for Indigenous and non-Indigenous communities. The research focused particularly on the demographic impacts with our analysis showing that up to 14 per cent of men and up to 2 per cent of women between 20 to 39 years from individual remote Indigenous communities might be in prison at any given point in time. Moreover, the results for men indicate there is no community that would not be affected by the increasing incarceration rate since the lower part of the range is at 4 per cent.

The proportion of men or women 'missing' suggests impacts will be significant enough to affect present and future population growth and change. For example, the absence of males is likely to increase the proportion of single parent families.

The analysis is based on a large number of assumptions but, if it were possible to relax any of the individual assumptions, for example the independent chances of going to prison or the common size of communities and demographic structures, then the impact would tend to make the results of the analyses even more dispersed, resulting in wider confidence intervals. This means, in reality, some communities may be subject to even higher proportions of people missing in jail across all age groups.

A range of demographic impacts might be anticipated given the worrying numbers presented in this study. Besides a rise in single parent households and a reduction in the number of newborns (from women and men in their prime child bearing years being in prison), incarceration represents another form of temporary out 'migration', with flow-on effects for the community. In the light of the literature, we discovered such flow-on effects can be of social and economic nature. These range from adverse health effects, to financial distress and social dysfunction (Clear 2008; Cuneen 2001; Dawson, Jackson and Nyamathi 2012; Edney 2002; Foster and Hagan 2013; Hagan and Dinovitzer 1999; Roberts 2004).

The *Social Justice and Native Title Report* (2014) and the *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) consider 'Justice Reinvestment' (JR) as a means to reduce the raising rate of incarceration and consequently the social, economic and cultural difficulties. The idea of justice reinvestment is based on the diversion of a portion of the funds for imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested into services that address the underlying causes of crime in these communities. Wood (2014) investigated the degree to which justice reinvestment could deliver some or

all of its promises, but also its problems in terms of implementation, use and long-term viability in Australia. Based on the experiences from implementing JR in the United States, he concludes the success or non-success of JR in Australia will be less likely due to problems of bad policy transfer rather than several other factors (Wood 2014). Such factors include the ability of JR advocates to implement JR initiatives within a society with its own brand of penal populism and a society with unique problems facing deprived and high-stakes communities.

This research has provided initial insights into the complex issue of incarceration and its associated demographic impacts for small and remote communities in the NT. Looking into the future, further research is necessary. For example, following the literature review, in-depth research on the social impacts of Indigenous incarceration in remote communities would be valuable. Moreover, a projection forward of the rates of incarceration based on existing trends would be of interest to ascertain likely future impacts for communities.

What this research shows clearly is the rates of incarceration in the NT are presently extremely high. The data also demonstrate the very large differences in rates between Indigenous Territorians and others, reinforcing Gooda's call for the need for a social justice indicator as part of the Closing the Gap strategy. A simple measure and target could be to reduce the gap in the imprisonment rates for 20 to 39 year olds during the next decade.

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Punishment and Democracy in Brazil: Mass Incarceration in Times of Social Inclusion

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Conference subtheme: Inequality, punishment and social exclusion in Latin America

Abstract

The democratic transition in Brazil in the 1980s was accompanied by strong optimism in relation to the return of civil liberties and the provision of social rights. In spite of political and economic turbulence, this democratic period resulted in the progressive adoption of inclusionary policies, the reduction of inequality and the expansion of rights to historically marginalised social groups. This atmosphere of social amelioration, however, has been heavily shaken by the concomitant development of mass incarceration within the criminal justice system. The expansion of the Brazilian prison system reached unprecedented levels, keeping behind bars more than half a million prisoners in recent years. The efforts of the federal government to create a more robust and centralised apparatus of crime control together with public outcry for tougher measures has endangered many of the inclusive policies enacted during this period. This paper explores this current incarceration problem and its roots in a process of recent modernisation at the hands of the federal government.

Introduction

The recent process of democratisation in Brazil has led to a more progressive approach in terms of state intervention as a vast array of political and social rights were granted by the new constitutional order, appeasing the social movements and political organisations subject to the hardships and repression of the past military regime (Carvalho 2001). The end of this regime reactivated a public sphere in which concerns with individual liberties and social justice became prevalent (Holston 2007). The new legislative framework incorporated a number of elements to improve social conditions and ameliorate the living standards of marginal sectors of society. These advances have certainly affected the social structure of the country, although they still need to be furthered to encompass larger sectors of the population (McCann 2008; Reiter 2009).

The reforms of the criminal justice system and their respective consequences, however, might have hampered this recent process of the amelioration of socioeconomic conditions. The rise of democratic institutions, together with an increasing imprisonment of the lower classes (Wacquant 2008), presents an intriguing puzzle. The widening of democratic participation brought in its wake an increase in punitive practices and the expansion of a control network. This leads to a contradiction in which progressive measures have been counteracted by repressive means, subjecting the same population to both emancipatory practices and to the detrimental effects of imprisonment (Beckett and Godoy 2008).

A juridical order based on respect for human rights and social justice notwithstanding, the prison population has skyrocketed, leading to a situation of overcrowding throughout the system. During the period in which these reforms occurred, the country witnessed an unprecedented and steep rise in its prison population. The perception of violent crime and the respective reactions to this phenomenon had already occurred in the beginning of the democratic transition (Benevides 1983). Demands for harsher measures and a more robust action on the part of police forces have been accompanied by a retreat of the upper and middle classes from public spaces (Caldeira 2000; Chevigny 2003). Moving away from a politically authoritative regime, which was mostly concerned with political crimes and faced low levels of perceived urban delinquency, the new democratic period can also be characterised by a strong effort to cast the net of social control wider (Peralva 2000). Restructuring the agencies of social control through

more efficient systems of information, novel forms of policing and increased budgets has led to a stronger repressive apparatus, capable of better enforcing its potential punitive power, in turn resulting in mass imprisonment.

The contention here is that reforms of criminal justice introduced by the federal government have deeply transformed the field and established a new mode of governance of crime and punishment. In spite of a rhetoric of human rights and social justice, embedded in a newly created democratic order, this new approach has enhanced managerial efficiency, prompting a more punitive criminal justice in which police repression of property crimes and drug trafficking plays a major role. As a result, the situation of mass imprisonment and subjugation of marginalised communities has hindered the socioeconomic advances enabled by democratic transition. This paper aims to demonstrate that the current criminal justice in Brazil consequently presents a perverse challenge to democratic political participation.

The arrival of mass incarceration

The present situation of mass incarceration in Brazil is a recent problem in the country, which possessed relatively low rates of incarceration until the mid-1990s. Although the system always faced problems with abuse, overcrowding and precariousness of prison institutions (Chazkel 2009; Coelho 2005; Ferreira 2009), the escalation of incarceration brings unprecedented challenges to the criminal justice system. The system reached 607 731 inmates behind bars in June of 2014, with a rate of 299.7 prisoners per 100 000 inhabitants (Figure 1). The consequences for the prison system are appalling, but the social costs of this phenomenon exacts an even higher price.

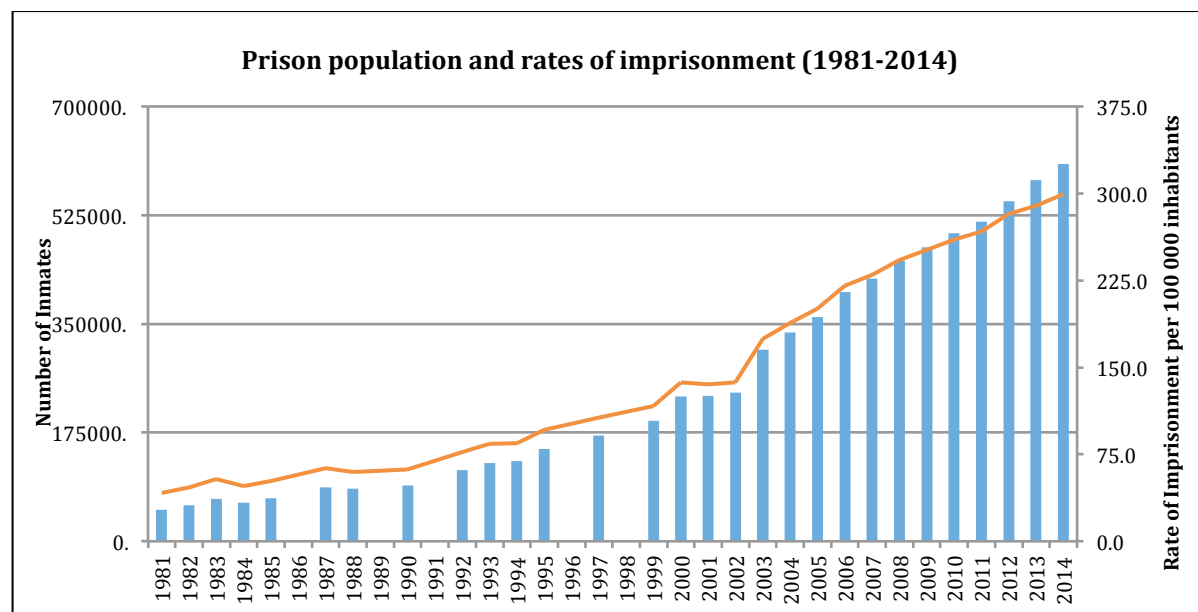


Figure 1: Prison population and rates of imprisonment (1981-2014) (Instituto Brasileiro de Geografia e Estatística [IBGE] 1981, 1984; Ministério da Justiça 1994, 1998, 2014).

Other official sources are already depicting a worse scenario than that presented in the official statistics of the Ministry of Justice. More recently, the National Council of Justice (Conselho Nacional de Justiça [CNJ]) has offered a grimmer depiction of the prison system and its respective population. Recent data from the Ministry of Justice have acknowledged a large number of pretrial detainees behind bars, placing pressure upon the judiciary for its apparent inefficiency and slowness in processing criminal cases. The judiciary struck back at the executive with its internal statistics. In Brazilian legislation, criminals convicted to a term shorter than four years of imprisonment can be sentenced to an open regime, in which they work during the day and return to special facilities in the evening. Under the influence of

Crofton's Irish system,¹ Brazilian jurisdiction also grants this allowance to inmates in the later stages of their prison term. However, the number of special facilities geared towards accommodating this type of inmate is far smaller than required. It has become a jurisprudential practice to shift this softer regime into a domiciliary prison system, in which prisoners must stay in their homes during the night and weekends. According to the judiciary, almost 150 000 individuals are currently in this situation. Concomitantly, the judiciary also revealed the number of active arrest warrants, totalling more than 370 000 open arrest orders. By revealing these numbers, the judicial system claimed that 715 655 individuals are officially incarcerated in the country, but the total should be more than one million inmates. Thus, the shortage of places rose from 210 436, based on the figures from the Ministry of Justice, to an astounding 732 427, according to the judiciary. These revised figures show that the ratio of pre-trial detainees dropped significantly, allowing the judicial system to fend off some of the criticism targeting its inefficiency (Figure 2).

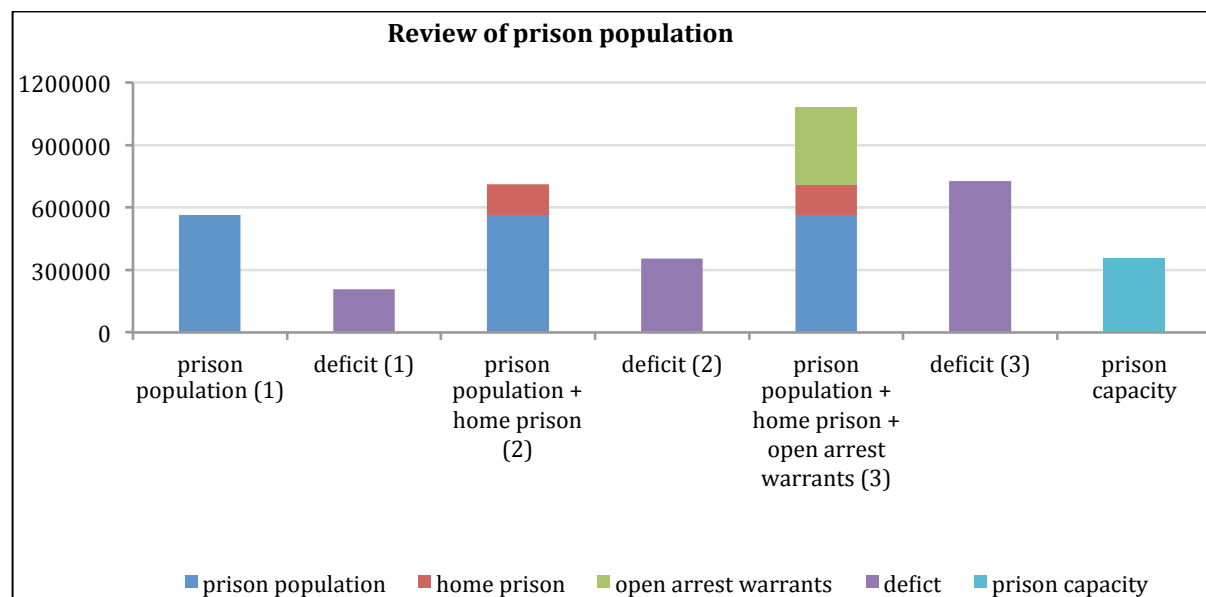


Figure 2: Review of prison population (CNJ 2014).

However, these figures still fail to account for the number of individuals subject to alternative penalties and under the control of the criminal justice apparatus. In an effort to divert people from prison, the country has enacted new types of punishment, including community service and restraining orders, for misdemeanours and other minor offences. As of 2009, 671 078 individuals were subject to some sort of alternative to incarceration but still remained within the reach of the criminal justice surveillance system (Ministério da Justiça 2010). In this sense, the expansion of custodial and non-custodial sanctions indicate the government is casting the net of social control wider (Cohen 1985). These numbers greatly enlarge the challenge of criminal justice and demonstrate a much larger reach of the institutions of social control.

Long term modernisation: Consolidating the apparatus

International literature offers a number of reasons and accounts for explaining the expansion of prison populations in other parts of the world (for an overview, see Garland 2013; Gottschalk 2012). Broadly, large structural and cultural changes in the last decades of the past century, grouped under the concept of late modernity, prompted the arrival of high-crime societies and the emergence of mass incarceration in Western societies (Garland 2001). Within this new arrangement, the retrenchment of the welfare state and the emergence of neoliberal policies (Cavadino and Dignan 2006; Wacquant 2009) — mostly in

¹ The stage progressive system consists of the transition from the sternest prison regime into increasingly softer ones as a developmental process towards regaining freedom.

regions with advanced liberal market economies (Lacey 2008) — resulted in the replacement of social provisions with penal measures. The effects of punitive electoral campaigns playing upon the fear of crime and the increasing media focus on crime and crime control helped to shift the nature of penal policies from rehabilitative measures to more punitive and, hence, custodial approaches (Beckett 1997; Gottschalk 2006). The overrepresentation of immigrants and other marginalised groups in jails and prisons also indicates the emergence of penal policies targeting vulnerable individuals. As for the US, given the nature of race relations in the country, mass incarceration has been indicated as a backlash against the Civil Rights Movement from the 1960s, subjecting Black people to higher rates of incarceration (Alexander 2010; Beckett 1997).

This narrative also resonates with Brazilian changes, even though cultural specificities require situating these transformations in a specific framework for the country. The prison expansion is certainly related to the rise of crime rates and the respective perception of crime as a pressing social problem since the end of the 1970s (Benevides 1983; Caldeira 2000),² but other factors also played an important role. The international narratives shed light on many of the developments also taking place in Latin America and Brazil (Fonseca 2012; Iturralde 2010; Sozzo 2012). From wide structural changes embedded in late modernity to the toughening discourse of political rhetoric in electoral campaigns, Brazilian penal policies have been subject to the contradictory and volatile pressures of these developments, resulting in a system increasingly prone to incarceration and penal control. For the purposes of the argument here, it is important to note the strengthening of the state apparatus as a relevant factor for the current predicament of the Brazilian criminal justice system.

In places where the state has already consolidated a bureaucratic apparatus, its size fluctuates, sometimes expanding and at other times shrinking. Multiple factors determine the reach of the state apparatus, such as the degree of intervention in social life and the amount of resources available for developing state structures. In Brazil, given its vast territorial extent and its complex process of development, the role of the state in the governance of social life has encountered moments of greater and lesser intervention. This fluctuation might prove helpful to understand historical patterns of imprisonment and crime control. In fact, the establishment of this more robust apparatus has been a long-term enterprise in which a more distanced historical approach reveals a steady growth of mechanisms and institutions of crime control and punishment. However, important transformations increased the pace of expansion since the return of democracy.

For the purposes of the present study, one interesting way to comprehend these changes is to scavenge the available data and establish a few possible comparisons between historically different sets of information. For instance, when analysing the proportion of types of offences among inmates behind bars in different historical moments, it is possible to follow the trend of an incremental bureaucratic development (Figure 3).

From the available data, it is clear that in the 1930s, homicides were the most important target of the criminal justice system. For historical reasons underlying the methods of data gathering, this only refers to sentenced inmates, which have been through the entire judicial process and received a final conviction. The preeminence of murderers in the convicted prison population around that time supports the hypothesis that other forms of deviance received different treatment from the formal institutions of crime control. In an environment still lacking a more solid state presence, the performance of crime control would focus on the most sensitive cases and types of behaviours.

² Though statistics of recorded crime might present a distorted view on crime trends (Caldeira 2000; Kitsuse and Cicourel 1963), the total number of homicides in this period offer compelling evidence of a steep increase in interpersonal violence and crime, as the figures rose from 11 194 to 58 497 homicides between 1979 and 2014, respectively representing a rate of 10 and 28.8 cases for 100 000 inhabitants.

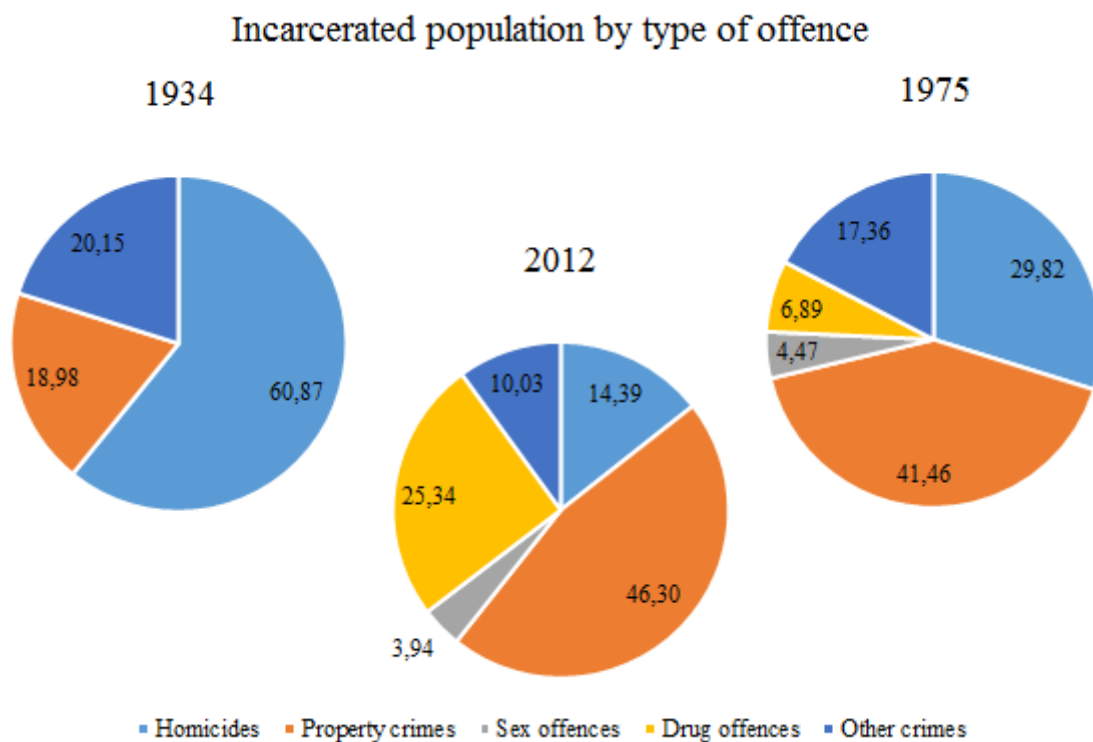


Figure 3: Incarcerated population by type of offence at different historical moments (IBGE 1975; Ministério da Justiça 1937, 2014).

The gradual change of social life and the development of bureaucratic structures have clearly contributed to a more pervasive state presence, incorporating different types and a larger number of behaviours into the purview of the criminal justice apparatus. The increase in convictions for property crimes, the introduction of drug offences, and the unveiling of abuse and violence in domestic settings are all part of a recently formed crime complex whose surveillance and control encompass many more activities and behaviours. These transformations signal the emergence of a better assembled state apparatus, capable of better enforcing its rules and regulations. In spite of a very pronounced increase in homicide numbers since 1979, as previously indicated, the percentage of convicts for murder continues to fall in the overall prison population. On closer inspection, the rise of imprisoned convicts for property crimes and drug offences reveals, at the same time, a disturbing focus on the machinery of crime control specialising on the delinquency in the lower echelons of the social structure.

In a longer historical series, however, it is possible to notice the expansion of the apparatus and its efficiency. The curve of convicted inmates (Figure 4) demonstrates how the criminal justice system deeply changed in recent decades, offering a much more interventionist apparatus of control.

The data of convicted prisoners demonstrate the substantial increase over the last decades, mostly after the end of the dictatorship. It is important to notice that the criminal system in the country has gone through important changes since the mid-1980s. Besides its sheer expansion, the federal administration has adopted a more robust approach to crime and punishment. Although heavily associated with other factors, the initiatives of the federal government bear great responsibility for this later increase.

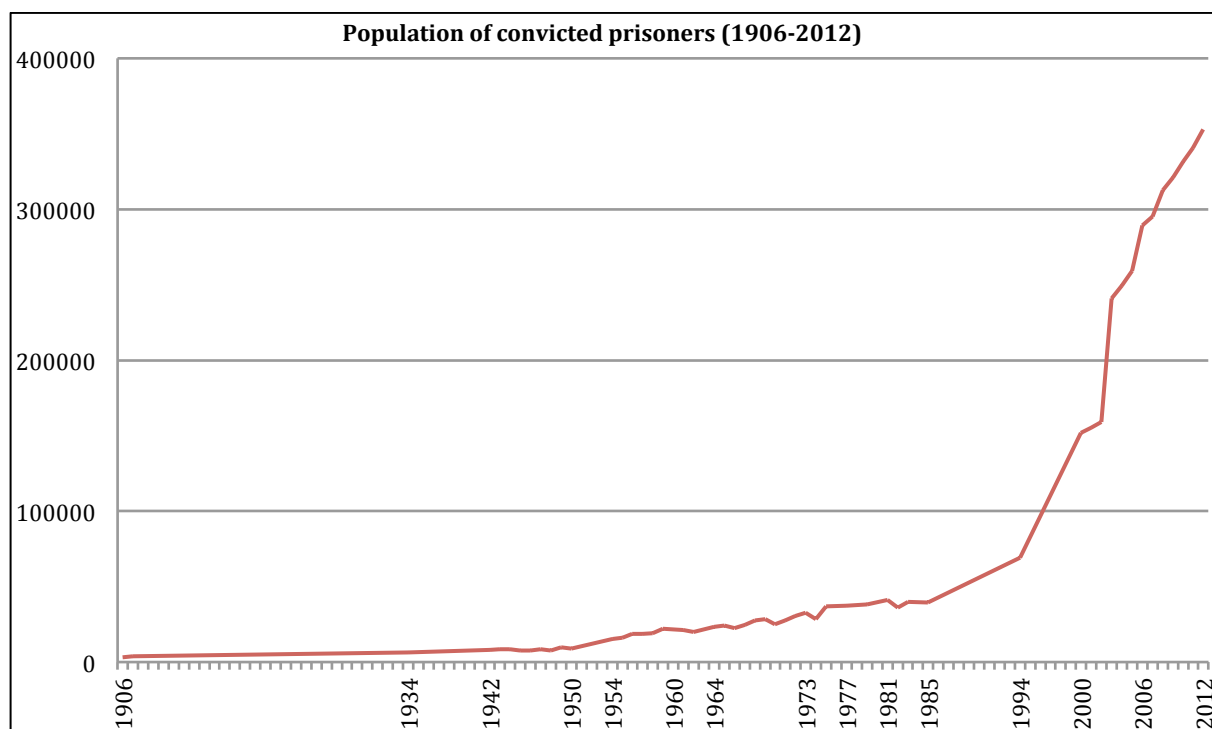


Figure 4: Population of convicted prisoners 1906-2012 (IBGE 1981, 1984; Ministério da Justiça 1998)

The return of democracy: Federal government initiatives

Besides these long terms developments, the period after democratisation has witnessed an important reconfiguration of punishment and crime control in the country. The standard account in Brazil emphasises the political nature of this shift as a result of media outcry, in which tougher penal policies are deemed responsible for the recent mass incarceration. The *National Plan for Criminal and Penitentiary Policy (Plano Nacional de Política Criminal e Penitenciária)*, formulated in 2011 by the National Council of Criminal and Penitentiary Policy (Conselho Nacional de Política Criminal e Penitenciária [CNPCCP]), articulates a similar perspective in Brazil, stating that legislative opportunism and media frenzy ‘feed a pernicious fatalism and the feeling of revenge in the Brazilian people’, which leads to the ‘hatred of Brazilians against Brazilians’ and pushes for ‘institutional violence’ (Ministério da Justiça 2011: 1). This aligns with the argument that in recent decades, with the weakening of penal bureaucracies, it is possible to witness the reawakening of punitive feelings (Hallsworth 2002; Pratt 2000). Hence, attention towards popular attitudes is regarded as largely responsible for the worsening of incarceration.

However, this process does not take place in an institutional vacuum. The technocratic management of the criminal justice system, mostly at the federal level, has helped to create the current situation of mass incarceration. Public policies have been aimed at enhancing social control, allocating more resources, and integrating information systems. Three National Plans attempted to interweave federal, state, and local spheres (Instituto Cidadania 2002; Ministério da Justiça 2000, 2007). All this effort has the unintended consequence of enlarging the net of social control. At the same time, federal expenditure in this field increased 202 per cent between 2003 and 2009 (Fórum Brasileiro de Segurança Pública 2010) Thus, these policies were geared towards mass incarceration in the country.

In recent years, centralisation has become a trend within the criminal justice system as the federal government has increasingly taken on responsibility for crime control and imprisonment. After a moment of contradiction and volatility during democratic transition, the federal government stepped onto the field in an attempt to create a more integrated system, reduce disparities among different regions, and enhance overall institutional efficiency. From 2000, it established itself as major player within the field, in

charge of allocating budget lines, managing information, and developing nationwide policies. Most recently, it has created a Federal Prison System and an Emergency Police Force, but, above all, it has been issuing clear guidelines and monitoring performance indicators on regional levels (Soares 2006, 2007). This centralisation process follows a technocratic pattern, buffering the criminal justice system from state and local pressures. It seeks uniformity among states, reducing regional disparities, while at the same time producing a more rational decision-making process in which managerial techniques guide practice and enable accountability through performance indicators. These developments may form the core of a new mode of governance responsible, to a large extent, for most of the recent outcomes in the field.

In regards to punishment, the federal government has provided support for the expansion of the prison system, funding the creation of new establishments and places within it as the main solution to the problem of overcrowding. It is clear that growing numbers of inmates and deteriorating conditions of incarceration have prompted the federal government to provide support for the construction and expansion of prison facilities (Sapori 2007). Adopting these measures has surely contributed to the consolidation of mass imprisonment, as these reforms have revamped the prison system and prepared it for a more substantial role. In this sense, governmental action shows a high degree of ambivalence on this topic, as the government seeks to enlarge the capacity for imprisonment while acknowledging the need for alternatives to incarceration. It is difficult to reconcile this process of expansion with the ideals espoused in the new democratic order.

Conclusion

Democracy, considered only in its formal aspects, does not seem to clash with a more robust penal system, even in light of mass incarceration (Greenberg and West 2001). From this perspective, public deliberation and electoral participation could override inclusionary social processes and individual guarantees. This limited perspective on democracy is capable of reconciling democratic participation and the violation of a number of individual and political liberties, but this is surely not the kind of democracy adopted in the Brazilian constitutional framework.

The provision of the 1988 Charter granted solid protection of social, economic and cultural rights to the Brazilian citizenry, even though its actual implementation has been far from adequate. It associated democracy with the social betterment of the population, demanding higher levels of education, health and social protection for the full enjoyment of citizenship (Holston 2007). The constitutional order granted the country, in this sense, a social democracy with a key goal of delivering economic and social equality. The rise in incarceration delivers an important blow to this process, as it hinders the basis of the entire inclusionary enterprise.

The process of modernisation does not happen in a progressive continuum, in which each new step furthers the advances of past endeavours. It moves forward and backwards; it staggers. In recent years, this modernisation process made significant advances in Brazil. Vast social inclusion has been the most successful and conspicuous aspect of it. However, it also meant changes in other areas of social and institutional life. The predicament of mass incarceration and high crime rates has certainly been one of the downsides of these recent developments.

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Policing Expert Testimony in a Death Investigation: Medical Opinion as Legal Fact

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Conference subtheme: Contemporary challenges in legal processes

Abstract

Within coronial investigations, pathologists are called upon to give evidence as to cause of death. This evidence is given great weight by the coroners; after all, scientific 'truth' is widely deemed to be far more reliable than legal 'opinion'. The purpose of this paper is to examine the ontological and epistemological status of that evidence, from the perspectives of both the pathologists and the coroners. As part of an Australian Research Council Linkage Grant, interviews were conducted with seven pathologists and 10 coroners from within the Queensland coronial system. Contrary to expectations, and the work of philosophers of science, such as Feyerabend (1975), pathologists did not present their findings in terms of unequivocal facts or objective truths relating to causes of death. Rather, their evidence was largely presented as 'educated opinion' based upon 'the weight of evidence'. It was actually the coroners who translated that opinion into 'medical fact' within the proceedings of their death investigations, arguably as a consequence of the administrative necessity to reach a clear-cut finding as to cause of death, and on the basis of their own understanding of the ontology of medical knowledge. These findings support Latour's (2010) claim that law requires a fundamentally different epistemology to science, and that science is not entirely to blame for the extravagant truth-claims made on its behalf.

Introduction

The central role of the coroner is to preside over the investigation of unexpected and unnatural deaths. In Australia, where coroners are legally trained, they are aided in their investigatory work by a number of other agencies: police, who visit the scene of the death and gather relevant information; coronial counsellors, who liaise with the family throughout the investigation; and pathologists, who perform autopsies and other medical procedures on the deceased. It is the coroners who are responsible for determining the cause of death, the identity of the deceased and the date and place of death, and for recording this information in the Registry of Births, Deaths and Marriages (Barnes and Carpenter 2011). Around Australia, deaths investigated by coroners make up only a small percentage — between 10 and 20 per cent — of all deaths in a community (Freckelton and Ranson 2006). For deaths that are not reported, the cause is certified by individual doctors without reference to the coroner at all. The primary focus of coronial investigations is neither criminal charges nor disciplinary action, but the benign administrative task of creating accurate death certificates. Over 95 per cent of coronial deaths are dealt with administratively 'on the papers', with only the small remainder deemed sufficiently contentious to warrant an inquest.

While the epistemological and administrative logic of such death investigations appears to be relatively straightforward and unproblematic, in actuality coronial courts have long been a site of contestation. From its inception at the end of the twelfth century in England, the role of coroner has changed on a number of occasions. Beginning principally as a revenue-raising office for the sovereign, the coroner eventually morphed into an investigator of death. Even with this crucial role, the position of the coroner eventually began to decline in importance due to the rise of a parallel legal office — the Justice of the Peace — such that by 1500 the sole remaining function performed by the coroner was the holding of inquests into violent deaths (Knapman 1993). Tension continued to exist between these two positions for

the next 300 years, and it was only completely resolved with the clarification of roles in the nineteenth century.

This has not been the only point of contestation. By the end of the nineteenth century, the investigative work conducted by the coroner to provide evidence for inquests was delegated to the police force who undertook these tasks under the direction of the coroner. As part of these changes, the long-standing tradition of the 'coronial jury' was no longer mandatory. Not only did this discontinue the practice of the coroner summoning juries for inquests, but it also established a lesser reliance on the lay perspectives of the public that constituted these juries (Freckelton and Ranson 2006). Burney (2006) contends that these changes signalled the start of a long struggle over the role of coroner. That is, medicine began a struggle for dominance against much older forms of organisation and sets of truth-claims — largely those of the wider citizenry, manifest in the forms of the elected jury, and the legal review of evidence within the public hearing.

It has been argued elsewhere that this is an example of the contemporary dominance of medical truths over other sets of knowledges (Carpenter and Tait 2010). That is, legally trained coroners now prioritise medical cause over legal circumstance in coronial investigations, most notably through a heavy reliance on orders for full internal autopsy. Medical truths as to the cause of death are used as confirmation of any circumstantial evidence gathered at the scene and, as such, the objective scientific facts presented in the pathologist's report become the final arbiter of the case.

This paper asks the question: are the epistemological issues that simple? Do doctors bring medical facts to the coronial investigation, facts that trump any other knowledges available to the coroner? Is the coroner given no real choice, other than to accede to power of medical truth? Arguably, this study presents a significantly more complex picture.

Medicine and the production of truth

Truth has always been a complex philosophical issue. While few philosophers would consider the matter in any way resolved, most would accept that the rise of modernity at the end of the seventeenth century signalled a new way of approaching the issue. With its mantra of truth, progress and objectivity, modernity sought to step out of what it saw as the intellectual dark ages, characterised by truth claims based upon religious authority and tradition, and replace them instead with a new set of possibilities surrounding the production of knowledge. And central to this new way of thinking was the discipline of science.

For the last 250 years, the central operating logic of science is that truth is not something that we produce, but rather something that we objectively and dispassionately uncover. Indeed, part of the foundational rationality of science — and, in particular, the scientific method — is that science is the *only* way of reliably accessing truth. This depiction should be familiar to all of us, at first glance, science has always been its own best publicist, cordoning off the rights to the production of truth, and disparaging other types of truth claims (Tait 2005). This has particularly been the claim within modern Western medicine, which has constantly sought to marginalise other systems of healing (Foucault 1973).

A number of philosophers have taken significant issue with what they saw as science's depiction of itself — most notably Feyerabend (1978). He suggests that a number of qualifications should be placed upon the claims made by science, two of which are worthy of mention here. First, Feyerabend argues that the relatively uncritical acceptance of scientific truths is based upon a belief in its infallibility, in that it can be separated from all other ideologies — religion, myth, superstition, tradition — by the notion that it can prove its claims. Science is not seen as requiring any form of faith for its operation, it is simply regarded as the most efficient means available for 'uncovering' truth, based in the 'fair, rigorous and controlled' scientific method. However, Feyerabend (1981) famously argues that there is no realistic evidence to

demonstrate that the scientific method has any more validity than do the standards that underlie the practice of magic — given that the ‘rigorous’ scientific method is, in practical terms, a generally nebulous collection of rules and procedures, applied unevenly and pragmatically, and ‘supplemented by unscientific methods and unscientific results’ (Feyerabend 1978: 105).

Second, Feyerabend (1978, 1981) argues that science is merely an ideology — more pervasive and successful than other existing ideologies, but an ideology nevertheless. Analogous to the right that once belonged to religion, science now exists in a conceptual framework that bestows upon it the sole legitimate right to contemporary truth-formation. Furthermore, the ideology of science is compulsory (all children must be taught science), exclusory (other truth-building systems are debarred/ridiculed) and undemocratic (when a scientist says it is true, it must be true).

When this understanding of scientific knowledge is applied to the information provided by the pathologists to the coroners as part of death investigations, Feyerabend would likely make the following observations: first, there is nothing ontologically absolute about the truths produced via the autopsy. The medical methodologies that organise their assembly are shaped and executed within social contexts; there are no guarantees as to the consistency of their application; and, during the autopsy itself, they are likely to be supplemented by any number of other ‘unscientific’ knowledges and practices.

Third, Feyerabend would also likely argue that the pathologist’s report often operates within a context that is compulsory, exclusory, and undemocratic: it is compulsory, in that coroners often feel epistemologically obliged to order autopsies, even where the cause of death does not appear to be in dispute; it is exclusory, in that medical knowledges are deemed to supersede other truth claims during coronial inquiries, such as police evidence collected at the scene, when there is any disagreement between the two; and it is undemocratic, in that if a pathologist posits a particular cause of death, then that is precisely how they died, all evidence to the contrary notwithstanding.

This paper will test Feyerabend’s assessment of scientific knowledge, via the specific medium of expert testimony within coronial inquiries. That is, the paper will explore aspects of the relation between medical assessments of cause of death within the coronial system, and the findings reached by that system. Do pathologists present ‘facts’ to coroners, or is something else going on?

The research project and methodology

This paper is situated within a ten-year history of funded research from both government departments and the Australian Research Council. In 2005, the research began with an exploration of the decision making of coroners in the context of the newly enacted *Coroners Act 2003* in Queensland. All closed paper coronial files for the first 12 months of the operation of the *Coroners Act 2003* were examined by a team of non-medical researchers. A range of documents were used to create a picture of the decision making process: initial police reports, autopsy orders from the coroner to the pathologist, autopsy findings and follow-up reports, and cause of death certificates issued by the coroner to the Registrar of Births, Deaths and Marriages. Information on file also deemed relevant included any written correspondence between coroners, pathologists, police, and coronial counsellors.

An issue was identified in the research which speaks directly to the current paper and also served to inform subsequent research: the decision making of coroners often appeared to be inconsistent and contradictory. Subsequent research sought to explore this issue (among a range of others) in more depth through interviews with a range of coronial personnel, including coroners, pathologists, counsellors, nurses, and police. In this instance, questions focused upon how each professional group organise their professional responsibilities, and reach their conclusions. Based on the purposive sampling of the most experienced personnel in one Australian jurisdiction, 10 full time coroners and seven forensic pathologists were interviewed. The interviews were semi-structured, and were conducted over a nine-

month period in 2012, taking between one and two hours each to complete. All interviews were conducted by one researcher for consistency of approach, and transcribed by a professional service before being sent back to each interviewee for confirmation. Thematic analysis was the key process utilised in this research, and an inductive approach to the data was favoured. Thematic analysis of the transcripts began with a process of schematic coding, which required all transcripts to be read in their entirety by the research team. Themes were identified through a series of discussions between the research team where both dominant and emergent themes were identified and then reviewed.

At this point it is important to note that thematic analysis is a recursive rather than a linear process (Braun and Clarke 2006). Rather than simply moving from one stage to the next, analysis moves back and forth between the phases as required. Once 'expert testimony' was identified as a pertinent issue within the transcripts, a process of schematic coding began where sub-themes were then identified. The sub-themes were identified as: the coronial status of pathologists, the ontological status of medical statements, and the evidentiary requirements of the coronial system.

Results

The ontological status of medical statements

The key finding of this study is that the evidence given by pathologists is understood in very different ways by the two central players — the pathologists themselves, and the coroners. This research suggests that the evidence given by pathologists at coronial inquiries is always presented as 'medical opinion'. That is, causes of death are described in terms of likelihood and probability, rather than as categorical and indisputable truths.

Sometimes the duty pathologist and me may have a different opinion, so the duty pathologist may have said, yeah, that's fine, I'm happy with an external and may then come to me and I might have a different opinion. Pathologist 5

When everything's in, we'll collate it all together and provide a report to the coroner and provide him with our findings and present him with our opinion as to the cause of death. Pathologist 4

So you present your expert opinion and then the coroner makes a decision on that. Pathologist 3

This is not to say that pathologists do not often have very high degrees of confidence in their opinions, or that those opinions are not founded upon a wealth of medical data; however, this still does not elevate their own opinions to the status of 'objective truth':

When I walk into a court room or an inquest I will be asked to maintain the highest rigorous scientific standards as to what I found and I will be expected to come up with an argument to establish why I believe this is the cause of death, and to support my opinion with facts. Now, at the end of the day what I come up with is an opinion, but I have to demonstrate that I've got a sub-strata of facts that can support quite solidly that opinion. Pathologist 4

However, this is not generally how that evidence is received by the coroners. Within the context of the coronial court, this research suggests that 'medical opinion' is translated by the coroners as 'medical fact'.

Pathologists are able to say what the cause of death is; we usually sign it off. Coroner 2

According to this understanding of medical statements, autopsies do not simply provide additional evidence for the coronial inquiry, they provide an unequivocal cause of death — an objective truth, around which to frame a matrix of explanation.

So they'll decide (the police) there's no suspicious circumstances, that it was probably a natural death; but then the autopsy will confirm that. Coroner 3

Well, you've got to rely on the medicine of it. Coroner 9

Indeed, the medical 'facts' of the autopsy are often understood as the only truly indispensable element of the investigation. Other truth-claims — whether made by witnesses, or from police at the scene of the death — are deemed to require the 'real' truth of the medical autopsy to provide a solid foundation to the entire process.

So, any violent or unnatural deaths, or deaths arising out of a medical context, we still most often have to have autopsies. Otherwise, if there's going to be an investigation, the investigation tends not to get anywhere. Coroner 7

The evidentiary requirements of the coronial system

The second central finding of this research is that the evidence (the medical opinion) provided by the pathologist is not only principally *understood* by the coroner as 'objective truth', it is also administratively deployed by the coroner as an objective truth. The detail of the pathologist's evidence is widely regarded as irrelevant by the coroner, with the sole relevant issue being an unequivocal statement as to cause of death.

We come from completely different standpoints; we simply want to know the cause of death, so why do we need the nth degree about the weight of each organ etc. And so there's that tension between coroners and pathologists. Coroner 8.

The requirement for a definitive cause of death is one of the principal factors organising the coroner's relationship to both the pathologist and to their evidence. Coroners are often presented with a cause of death as 'undetermined' by the pathologists, and this sits uneasily with both the coroners' visceral expectations regarding the ontology of medical truth and the statutory requirements of the role.

Some of the pathologists are producing more undetermined causes of death on the autopsy ... but still describe in the report the various possibilities of what could've caused the death — what's more likely — and as a result I have to make a decision, well, it's more likely that this, in fact, is the cause of death, and that's what I'll say in my finding. Coroner 2

Often the pathologists will come back with an undetermined cause of death but, with a bit of history in there which tells a little more about possible causes, I can then make a finding as to what the cause of death is. Coroner 2

The coroners often sought to steer the pathologists into committing themselves to a particular definitive cause of death, even where the evidence was partial, ambiguous or incomplete.

She was umming and ahing about whether it was a myocardial infarction or whether it was a PE [pulmonary embolism], and I just basically just talked her through, and got her to reach a decision. Coroner 8

At the moment, if there's multiple possible medications, toxicology testing takes some time, months and months. You can't have the body waiting around so you just have to make a decision. Coroner 2

On those occasions where the pathologist was unwilling to allow their medical opinion to be translated into medical fact — at least not without further autopsy evidence — the coroner's irritation was often clear.

Electrocution's a classic one, because I've had cases where there were witnesses, the person's going Bzzzzzzzzzz, there's burn marks on the hands from the object where the current's passing through ... he collapsed, and was dead instantly. Now some pathologists will say we still need to do an autopsy because they can't exclude heart attack — what's the chances of that? And then what happens is that they refuse to certify that it was an electrocution!
Coroner 4

In summary, within the context of the coronial court, there exists a complex historical relationship between the coroner and the pathologist, with tensions largely centering upon the related issues of expertise, status and authority. Importantly, while medical information from autopsies is presented in terms of 'opinion and probability' by the pathologists, this evidence is translated by the coroners themselves into 'scientific fact'. This translation occurs for both epistemological and administrative reasons.

Discussion

The results of this study suggest two areas of further discussion.

1) Feyerabend's critique of science

To what extent is Feyerabend correct about the nature of scientific truth-claims? At this point, it would be fairly easy to assert that he is both correct, and incorrect. That is, Feyerabend is correct in that the scientific evidence tendered by the pathologists in the coronial court is compulsory, exclusory and undemocratic — risk-averse coroners request autopsies as a matter of reflex, and this information is prioritised over other sets of truth-claims, which are often marginalised in the process, such as eye-witness accounts, family histories, and collations of other evidence from the scene of death.

However, it is equally possible to suggest that he would be incorrect — in this instance — in assigning responsibility for these social/ideological elements of the scientific method to the scientists themselves. This research suggests that while pathologists remain circumspect about the information they provide to the coronial process, it is the coroners who translate that evidence into the compulsory, the exclusory and the undemocratic. Pathologists may base their opinions upon 'a sub-strata of facts'. However, it is the coroners who interpret that opinion as unequivocal truth: that is, 'Pathologists are able to say what cause of death is'.

However, Feyerabend would quite rightly argue that even though pathologists may not make frequent claims to either complete scientific objectivity or direct access to the noumenal realm of facts-in-themselves, they still certainly benefit from widely held assumptions that these two elements are part and parcel of the scientific method, and hence part of the bedrock of the knowledge it produces. To put it another way, while there may be no expectation that scientists should continually attenuate each statement they make — lest it is taken as claim to objective truth — over the last 300 years, 'science' (as a reified entity) has traditionally been its own best self-publicist in the modernist struggle for the high ground of knowledge production (Tait 2010). Significantly, coroners are as exposed to this rosy depiction of science as the rest of us.

2) *Medicine and the legal process*

A trial is presumed to be a search for truth, but, technically, it is a search for a decision.
(Felman 1997: 738)

In addition to both the historic, modernity-related reasons for coroners to valorise and reify scientific 'facts', as well as the more contemporary cultural forces that have accentuated this perception, it is arguably the legal system itself that requires its expert evidence to be conceptualised in terms of objective truth. Kramar (2006) argues that pathologists are not simply reading biological information when assessing cause of death; they are filtering that information through personal and professional moral lens to reach their conclusions. These subjective judgements are distilled into medical knowledge:

which is taken up in law as expert opinion evidence to become legal fact. Once this evidence has become legal fact, it becomes unassailable, having both passed medical-scientific scrutiny and been accepted as independent, disinterested medical knowledge ...
(Kramar 2006: 818)

The foundational logic of this argument is supported by Latour (2010: 229) who states that both scientists and lawyers (pathologists and coroners) speak 'the truth', but each according to quite different criteria: 'two distinct conceptions of exactitude and talent, of faithfulness and professionalism, of scruple and objectivity'. Crucially, scientists struggle to understand how judges can employ the term 'incontrovertible fact' to evidence that has not been subject to rigorous critique and counter-submission. Latour (2010) asserts that in cases where scientific evidence is required — as in coronial investigations — it is law, rather than science, that seeks the objective authoritative fact. It is seen to be the task of the coroner to constitute a domain of unassailable truth as soon as possible, so that this truth can be deployed within the administrative and judicial framework of the rule of law. Importantly, the most important element of the rule of law is 'the judgement' — in this case, the finding as to cause of death.

Conclusion

This research has reached a number of conclusions, some predictable within the context of the coronial inquiry, others less so. First, coroners and pathologists have a complex and often difficult relationship within death investigations, and while coroners have the final word in determining cause of death, the evidence of the pathologist carries considerable weight, more weight indeed than any other contributor to the proceedings. Second, while the pathologists present their evidence in terms of opinion and probability, this is interpreted by the coroner as objective fact; that is, within the context of the coronial inquiry, the coroner translates the ontology of the pathologist's evidence into detached, independent truth. Third, these newly-minted 'medical facts' are not only *understood* by the coroner as truths, they are administratively *deployed* as such to reach a legal decision as to cause of death. Finally, and by way of summary, this research suggests that the chief conveyers of the ideology of scientific and medical certainty are not the pathologists themselves, but rather the coroners. This is in part because of a broad acceptance of the 'infallibility' ideology by coroners, but also because of the administrative and judicial requirements of the coronial system itself.

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Victims' Rights and the Right to Review

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Conference subtheme: Critical victimology

Abstract

In *R v Christopher Killick* [2011] EWCA Crim 1608, the Criminal Division of the Court of Appeal for England and Wales gave a decision setting out the rights of a crime victim to seek review of a Crown Prosecution Service (CPS) decision not to prosecute and concluded that victims have the right to seek review in such circumstances. This included a recommendation that the right to review should be made the subject of clearer procedures and guidance. This paper discusses article 10 of the *Proposal for a Directive of the European Parliament and of the Council, (2011) 2011/0129 (COD), 18 May 2011 establishing minimum standards on the rights, support and protection of victims of crime* (see article 11 Final Directive) as applied in the Killick case. The paper further discusses the implementation of *Killick* in prosecution policy, namely in the CPS guideline on the victims' right to review (Director of Public Prosecutions for England and Wales 2014). Opportunities for victim participation will be canvassed in light of tensions between discourses of victim rights and the duty of the Crown to prosecute in the public interest.

Introduction

The integration of the victim into adversarial systems of justice has tended to occur at the periphery of criminal law and procedure. Most common law jurisdictions began the process of integration in the 1960s and 1970s, in so far as broad-based compensation was made available for injuries caused by a range of criminal offences (see generally Meirs 1985). Support services followed, providing victims with a range of welfare-based options that were largely supported by government, or rights-based, not-for-profit movements, or later as combined by agency agreements. Access to counselling, medical treatment, and workplace support tended to be provided by the not-for-profits while court and witness support tended to be provided by the state. The dynamic of who provided these services changed in the 1980s and 1990s as government was keen to utilise not-for-profits to provide services otherwise funded by the state (Meirs 2007). The 1985 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* also provided impetus for the staging of crime victims which influenced the emergence of declarations or charters of victim rights on a local level (see Sumner 1987). While these tended to be declaratory and not enforceable, such charters did lead to the reconsideration of the plight of the victim and placed them in a firmer public policy context. Indeed, by the advent of the twenty-first century, governments were addressing victims as the priority group (Doak 2008; Hall 2009). Arguably, boundaries which once separated the victim from substantive participation in adversarial systems of justice are now being eroded and dismantled in favour of rights and powers that can be enforced against the state or the accused, albeit in an unconventional, fragmented and at times controversial way.

This paper examines the continuation of the trend toward the provision of enforceable rights for victims of crime by examining the ratification of the victim's right to challenge and seek review of a prosecutor's decision not to proceed with a charge. The case of *R v Killick* [2011] EWCA Crim 1608 provided the means by which the Court of Appeal of England and Wales considered the *Proposal for a Directive of the European Parliament and of the Council, establishing minimum standards on the rights, support and protection of victims of crime* (2011) 2011/0129(COD) (Draft Directive) (now finalised as the *Directive of the European Parliament and of the Council, (2012) 2012/29/EU, 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision [2012] 2001/220/JHA [Final Directive]*), which provides a range of victim rights to be ratified in the domestic criminal procedure of member states. Although limited circumstances exist that do not allow for the challenging of a prosecutor's decision not to proceed, such as where the police refuse to

investigate, or where charges are downgraded or subject to a plea deal, *R v Killick* suggests that the consideration of human rights declarations and instruments on the domestic level is a key way victims are being granted significant access to justice in an unprecedented manner. The ratification of victim rights through domestic processes means that such rights are made compatible and consistent with local rules regarding criminal law and procedure. This maintains the foundational right of the accused to a fair trial and ensures that the integration of victim interests occurs in a way that is consistent with the accused's right to due process and procedural fairness. Complementary processes of private prosecution are also considered as supporting developments to increase the victim's right to pre-trial review processes.

R v Killick and the draft directive

The questioning of a decision of the police or prosecution to charge or proceed on indictment has long been identified as a question to be resolved in the public interest alone. The personal views of the victim are not part of the public interest. Although prosecution guidelines increasingly require victims to be kept informed of, or even consulted about, charges brought (including charge bargaining or plea deals reached), the decision to settle on a final charge or to not proceed with a charge has been preserved as that of the prosecution, acting alone. However, the Final Directive provides that member states be able to set a process to allow victims to seek review of decisions not to proceed with a prosecution. This falls against a background of the consultative rights of the victim in plea bargaining (Verdun-Jones and Yijerino 2002).

The Criminal Division of the Court of Appeal of England and Wales dealt with the victim's right to review under the Draft Directive in the case of *R v Killick*. In 2006, two men suffering from cerebral palsy informed police of anal rape and sexual assault by the accused, Christopher Killick. Information was also received on a third complaint of non-consensual buggery. Due to their disabilities, the complainants required assistance when providing evidence. Killick also suffered from cerebral palsy, though to an extent considered to be less than the complainants. Killick was arrested and interviewed in 2006. He denied any form of sexual activity with the two complainants, and asserted that the anal intercourse with the third complainant was consensual. The Crown Prosecution Service (CPS) made the decision in 2007 not to prosecute. The victims then complained about the decision not to proceed against Killick, which resulted in an internal review pursuant to the CPS complaints procedure. The review determined that Killick could be prosecuted, although he had since been informed in writing that he would not be proceeded against. As the complaints procedure resulted in a favourable outcome for the victims there was no need to continue the matter to judicial review, although this option would be available had their complaint been denied. Killick appeared in the Central Criminal Court in 2010. The defence requested that proceedings ought to be stayed as an abuse of process, but this was rejected by the court. The trial continued and Killick was convicted of buggery and sexual assault but acquitted of anal rape. Killick was sentenced to three years' imprisonment. Killick then appealed his conviction and the Court of Appeal (Criminal Division) took the opportunity to review the extent to which the Draft European Union Directive modified English criminal procedure.

Considering the Draft Directive, the Court of Appeal of England and Wales (Criminal Division) held that the 'decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance' (*R v Killick* [2011] EWCA Crim 1608 [48]). The Crown contention was that the victims had no right to request a review of a decision not to prosecute, but could utilise the existing CPS complaints procedure.¹ In the context of existing internal CPS procedures, this was a correct statement of the power available to the victim although the victim always retains the power to seek review of an executive decision where made

¹ Although characterised as a complaints procedure, the CPS process does not need to involve dissatisfaction with any particular prosecutor, but may be invoked where a questionable decision has been reached.

contrary to law. However, in the context of the obligation to consider, and where possible ratify, instruments of the European Union (EU), the Court of Appeal held that:

[w]e can discern no reason why what these complainants were doing was other than exercising their right to seek a review about the prosecutor's decision. That right under the law and procedure of England and Wales is in essence the same as the right expressed in Article 10 of the Draft European Union Directive on establishing minimum standards on the rights, support and protection of victims of crime dated 18 May 2011 which provides: 'Member States shall ensure that victims have the right to have any decision not to prosecute reviewed.' (*R v Killick* [2011] EWCA Crim 1608 [49])

The only other alternative, other than existing CPS policy regarding complaints, was for the victims to rely on the individual's right to seek judicial review in the High Court. High Court procedures make judicial review of a decision not to proceed with a charge difficult, with judicial reluctance to get involved in processes leading to the charging of suspects, a process widely accepted as an executive function. Relief would only be granted in the most exceptional cases where the internal policies of the executive (policies mandating a requirement by law) were not followed or defeated by a clear abuse of process. Seeking such relief would be expensive and thus prohibitive for many victims.

The Final Directive now sets out the process by which such tests ought to be now made.² Following the release of an interim guidance, the Director of Public Prosecutions for England and Wales released the *Victims Right to Review Guidance* in July 2014 (Director of Public Prosecutions for England and Wales (DPP) 2014). This guide explains the circumstances and procedures by which victims may seek review of a decision not to prosecute. The emergence of the victim's right to review is thus in policy guiding the CPS practice of complaints revision, rather than as a statutory directive of Parliament. The CPS guidance makes clear those circumstances that now give rise to the review mechanisms:

The right to request a review arises where the CPS:

- (i) makes the decision not to bring proceedings (i.e. at the pre-charge stage); or
- (ii) decides to discontinue (or withdraw in the Magistrates' Court) all charges involving the victim, thereby entirely ending all proceedings relating to them;
- (iii) offers no evidence in all proceedings relating to the victim; or
- (iv) decides to leave all charges in the proceedings to 'lie on file'. (DPP 2014: 3)

Where a decision not to proceed with a charge is made by the CPS, they will inform the victim of their decision to do so. This information will also specify whether the decision not to proceed is a qualifying decision, in that it is a decision which, with the victim's election, gives rise to the review mechanisms. The victim only need indicate that they seek review to initiate the review process. Once initiated, the CPS will conduct a local review. This will be conducted by a new prosecutor who will be assigned to the case. Where the victim's dissatisfaction with the original decision has not been resolved at the local level by a new prosecutor reviewing the original decision, they may complain further. This further complaint will initiate an independent review by the Appeal and Review Unit or by a Chief Crown Prosecutor, as appropriate. This review will consider the case *de novo* or as new, and will not use the original decision as a starting point. Only information available to the original decision-maker will be used in the appeals

² See article 11 of the Final Directive. Also see clause 43 of the preamble: 'The right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts. Any review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision, unless the initial decision not to prosecute was taken by the highest prosecuting authority, against whose decision no review can be made, in which case the review may be carried out by that same authority. The right to a review of a decision not to prosecute does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position'.

process. New information will need to be raised with the police. Where a decision not to charge is overturned, the matter may be reinitiated in court. Where no evidence was offered to the court, and the review process realised that this should not have happened, redress is limited to an explanation and an apology. This is because the court has already discontinued proceedings. Alternatively, the original decision may be upheld and the matter concluded. Should the victim continue to be dissatisfied, the only option open to them is to seek judicial review in court.

Private prosecution: A complementary process

Victims enjoy the right of private prosecution which, although rarely exercised, supports the victim's right to participate in decision-making processes. The power of the victim to initiate a private prosecution resides at common law as the power of the common informant. Technically, it may be exercised by any person informed of an offence. The power is exercised by informing a court, usually a court of first instance such as a Local or Magistrates' Court, of an offence. Technically, the ability to initiate a prosecution can be exercised by anyone, despite the common misconception that it is a police or state power to the exclusion of all others. Although any person may initiate a prosecution, a prosecution initiated by a non-state informant is usually subject to the scrutiny of a magistrate or court registrar prior to the listing of the charge and issuance of a summons or court attendance notice (see, for example, s 6(1) *Prosecution of Offences Act 1985* (UK); s 49 *Criminal Procedure Act 1986* (NSW)). This is to ensure that there is a basis for bringing the charge, and that it not been brought vexatiously, or as an abuse of process (see generally, Stark 2013).

Although the power to initiate a private prosecution is a necessary complement to the right to review protocols of the CPS — in that such a right underpins the prosecution in the first instance — the power to take over proceedings ultimately lies with the Director of Public Prosecutions. The CPS exercises this right in England and Wales. All that is required to take over a prosecution is the appearance of a CPS prosecutor in court. Once taken over, the victim loses their power to continue the matter, subject to the right to review process discussed herein, requiring the CPS to continue to prosecute the matter in the public interest (see *R (on the application of Gujra) v CPS* [2012] UKSC 52). Where the CPS takes over a prosecution, it will ordinarily write to the victim to inform them of the reason for doing so. Victims may also be entitled to press their rights under the *Victims Right to Review Guidance* (DPP 2014) once the CPS takes over a matter, demonstrating further connections between existing common law rights to prosecution and the new review process informed by the EU draft and final instruments.

Where a charge is brought by the police, but not taken over by the CPS, and the police choose not to continue to prosecute the matter, the victim may seek to continue the prosecution, although this does not involve a 'take over' power as exercised by the CPS. Where the CPS has the power to take over the prosecution, including access to the case-file and evidence of the police, the victim brings a new charge and presents their own evidence in court. Essentially, where the victim brings a private prosecution, the charging process and issuance of a summons would commence again, where the police decide not to proceed and where the matter is not taken over by the CPS. Where the CPS takes over the prosecution from either the police or victim and then decides not to proceed with the matter, the victim may avail themselves of the CPS rights to review process. The ability to bring a new charge where an investigation is discontinued by the police may be complicated where a charge is brought to court and withdrawn, discontinued, or otherwise 'left on the books', although the police have their own review mechanisms where victims are not satisfied with the outcome of an investigation (see Metropolitan Police 2015). A magistrate or registrar would be less likely to issue a summons or court attendance notice at the behest of the victim where the charge is potentially still under police investigation.

Conclusions

The movement towards a more formalised policy of the right to review is consistent with promulgation of victim rights and interests through human rights instruments and frameworks. This is what Elias (1985)

identified as the third wave of victim rights — the expression of the rights of victims not as a manifestation of welfare policy on the local level but as rights available to all persons, everywhere. While *R v Killick* demonstrates that such rights may not become meaningful for the victim until they are given local context by consideration by the courts (or parliament), the case does show how international norms for the treatment of victims may come to modify criminal law and procedure identified as excluding the victim under an adversarial model (see Verdun-Jones and Yijerino 2002). Although the right to request a review of a prosecution decision is limited in terms of the *Victims Right to Review Guidance* (DPP 2014), the articulation of a policy that now guides CPS decision-making in the first instance is an important milestone for victims in their integration into a system of justice that otherwise ill affords victims' rights that can be enforced against the state.

The careful integration of victim rights and interests has resulted in policy reconsiderations that challenge the state's exclusive access to crime and justice. This has resulted in the reconsideration of the way victims may be better integrated into proceedings in light of the state's need to prosecute crime, and the accused's need to access a trial process that lets them fairly test the state case against them. *R v Killick*, the Final Directive, and the *Victims Right to Review Guidance* (DPP 2014) provide an apt case study of the way in which victim rights may be appropriately considered against the state's need to continue to prosecute offences in the public interest. While the views of victims are considered, those views do not determine the outcome and must be weighed against the public interest at all times. As such, although the victim is given substantive rights of participation that may be enforced against the state, those rights never become determinative of an outcome nor usurp the state's right to prosecute. The removal of the process of review from the courts also ensures that the rights of the victim are not conflated with the rights of the accused in the trial context. The accused retains the right to challenge the Crown case without the victim acting as a third party to proceedings, should the matter be brought to court. The right to review is also consistent with the existing power of the victim to bring a private prosecution and, where taken over by the CPS, to have the decision to not continue a prosecution reviewed at the request of the victim.

Enforceable rights can be grouped according to the phases of the criminal trial and most are developed in response to discrete concerns for victim rights and interests as they become relevant during the different phases of the criminal trial process. This reasoning has increasingly influenced domestic law by statutory reform or, where permitted, the consideration of human rights decisions in common law courts. This process of the slow inclusion of discourses of human rights as a basis for procedural and substantive legal change has resulted in the uneven and fragmented integration of victim interests and explains how different jurisdictions have worked in different ways, and with different levels of urgency, to modify statutory and common law processes that otherwise afforded the victim few rights and privileges.

The processes traced in this paper demonstrate that the movement of victims towards enforceable rights is occurring on a local level through the ratification of human rights instruments and directives. This is largely the result of the existence of normative criminal processes that cannot be easily modified to accommodate the victim, who has never been afforded a significant role in modern systems of adversarial justice. As such, the integration of victims, especially where victim rights are enforceable and determinative against the state, must work around existing powers that grant the accused a fair trial and the state the power to administer the criminal justice process. The *Victims Right to Review Guidance* (DPP 2014) process now establishes a precedent of policy transfer and change through the consideration of human rights instruments on the local level.

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Conventions

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Can an Ecdysiast Fag Speak the Voice of Transgender? Phoenix (Un)Rising and the Assumptions in *Re Kevin* Revisited

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Abstract

Each night the men look so surprised

I change my sex before their eyes

Tell me if you can

What makes a man a man – Charles Aznavour, 'What makes a man a man (Comme ils disent)'.

In (the few) Western jurisdictions in which marriage remains a forensic artefact constructed on the basis of a man|woman binary, the anatomical and heteronormative assumptions which underlie the construction of marriage remain as artificial constructs which do not map well (if indeed at all) to current social, or even medical, approaches to gender. In *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, Justice Chislm sought to recast the forensic ascription of sex against a broader set of criteria, expanding the range of sexually dimorphic anatomy used to determine sex for the purposes of marriage in Australia and incorporating observations of psycho-social gender-differentiation as factors relevant to the ultimate question for the Court — 'What makes a man a man?'

Yet neither expansion is unproblematic. This article explores this fundamental forensic question against the background of Aznavour's 'Comme ils dissent', in which the persona of *un(e) stripteaseuse travesti* struggles to answer precisely the same question. It concludes that *Re Kevin* might offer no more sophisticated an analysis of the lived reality of trans than Aznavour's ecdysiast fag — not trans, but *un travesti*:

I shop and cook and sew a bit

Though mum does too, I must admit

I do it better.

Introduction

This journey through *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 [*Re Kevin*] is based on three observations. The first is that in the area of trans issues,¹ judicial decision-making now reflects a different approach to that which dominated legal discourse in the 1970s, when *Corbett v Corbett (otherwise Ashley)* (1970) 2 WLR 1306 [*Corbett*] laid down the definition of 'woman' for the purposes of marriage. The modern decisions — mostly characterised by decisions of other common law jurisdictions,² and the decision in *Re Kevin* — have been more readily informed by relevant psychological and social factors than their predecessors.

Secondly, while desirable, the inclusion of a range of theoretical or social observations as the substratum of decision-making threatens to produce a range of conflicts through a reliance on idiosyncratic and

¹ A note on terminology: the title of this article utilises the term "transgender" to indicate that the issues which are addressed speak to broad issues of gender identity different to that designated at birth, and its construction in the forensic domain. The individual actors — Aznavour's character, Kevin and others — however, are referred to by more specific terms ("transsexual", "transvestite"/"travesti") as their situation dictates. The forensic ascription and descriptions of sex and gender, however, extend beyond the boundaries created by the localised issues, and reflect the difficulties which forensic analysis (in the form of traditional legal logic) face in dealing with the phenomenon of transgender as it is manifested in specific situations.

² See, for example, *M v M* [1991] NZFLR 337; *W v W (physical inter-sex)* [2001] Fam 111; *Cossey v United Kingdom* (1990) 13 EHRR 622; *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603.

subjective material. Moreover, the legal flirtation with the scientific — the quest for objective reality — introduces tensions when the scientific resolution does not map well to traditional *legal* solutions.

And finally, there remains a resistance to trans marriage — significantly, within the legal and governmental community — which manifests in violence in a Foucauldian sense:

The judges of normality are present everywhere. We are in the society of the teacher-judge, the doctor-judge, the educator-judge, the social worker-judge; it is on them that the universal reign of the normative is based; and each individual, wherever he may find himself, subjects to it his body, his gestures, his behavior, his aptitudes, his achievements (Foucault 1995: 304)

Trans marriage remains conflicted within Australian law: in 2013, the Victorian government reportedly ‘invalidated’ the marriage of a Melbourne musician, Page Phoenix, who had been married on the basis of his passport (reflecting his post-transition gender as male), while his birth certificate recorded his birth gender, female (Kellaway 2014). According to the decision in *Re Kevin*, affirmed on appeal to the Full Court of the Federal Court, Page Phoenix should be free to marry on the basis of his post-transition gender.

A tale of three epistemes

Law, as it encounters the concept of transgender within the concept of marriage, witnesses not a simple bilateral conflict between crudely drawn conservative and radical approaches, but a clash of three views of the world. In the courtroom, a conservative and monolithic Judeo-Christian ethos opposes the expansive and inclusive suggestions of the socio-empathic. Yet lurking in the shadows is the shadow of the scientist.

By way, then, of further introduction, I want first to let another’s voice articulate the central question of *Re Kevin*:

My mum and I we live alone
A grand apartment is our home
In Fairhome Towers
I have to keep me company
Two dogs, a cat, a parakeet
Some plants and flowers
I help my mother with the chores
I wash, she dries, I do the floors
We work together
I shop and cook and sew a bit
Though mum does too, I must admit
I do it better. (Aznavour 1972)³

This description of simple domestic life prepares us for the question posed by Aznavour, ‘What makes a man a man?’⁴

³ All extracts from ‘What makes a man a man’ are from the 1972 English translation and recording of the original French, ‘Comme ils disent’.

⁴ The question, in a forensic setting, was framed in almost identical terms in 1999 by Harberge, CJ in *Littleton v Prange* 9 S.W.3d 223 [*Littleton v Prange*]: ‘This case involves the most basic of questions. When is a man a man, and when is a woman a woman?’

There is a superficial attraction in letting Aznavour sing the central question of *Re Kevin*. The literal meaning of the question is precisely that which must engage the court's mind — and the question, in both instances, is framed outside the comfy assumptions of forensic orthodoxy associated with heterosexual relationships. It is formed, rather, in the marginalised sub-cultures of *les étranger*, whose voices might (it might be thought) unite in opposition to the monolithic, but which actually manifest in a polyvocal resistance.

A second glance at these two cultures, however, might cause us to doubt the wisdom of letting Aznavour speak (or sing) for Kevin. What, after all, does the experience of Aznavour's ageing, camped-up drag-queen — *un(e) stripteaseuse travesti* whose self-image is revealingly (if naively and stereotypically) conceived in his outperforming his mother (with whom he still lives!) in the classically female role of homemaker.⁵ How much common cultural space do the *outré* localised epistemes of Aznavour's ecdysiast fag share with Kevin's struggle with his own, apparently ineluctable, nature? Kevin had eschewed the Barbie doll in favour of the rich phallic imagery of the toy sword and the plastic gun (*Re Kevin* [49]).

Setting the (epi)cene

Re Kevin arrives in the Family Court because Kevin and Jennifer have married. The nature of Kevin's legal person, however, was problematic. In NSW, he was formally recognised, to the limits of that State's jurisdiction, as a man.⁶ He holds a birth certificate recording that as legal fact. Kevin is a post-operative transsexual. Although the degree of surgical re-assignment is relatively low, the *extent* of his surgical intervention is not an issue before the court.⁷

Kevin disclosed to the marriage celebrant that, while his birth certificate reads 'male', it recorded not his 'birth sex' but his post-operative assigned sex. NSW law, while allowing for the re-issue of a certificate harmonised with post-transition gender, prescribes that the *legal* use of the certificate in extra-jurisdictional transactions is limited. Quite clearly, it does not provide conclusive legal proof of the sex of its holder for the purposes of the *Marriage Act 1961* (Cth).

The celebrant nonetheless performed a ceremony of marriage complying in all respects (save possibly one) with the requirements of the *Marriage Act*.

The *Marriage Act* defines marriage in terms reflecting Lord Penzance's description of marriage as 'the voluntary union of a man and a woman to the exclusion of all others, voluntarily entered into for life' (*Marriage Act 1961* (Cth) s5). 'Man' and 'woman' are not defined in the *Act* — hence the need, in Kevin's case, for judicial consideration of this most basic characteristic of humanity.

The fundamental nature of marriage, in the *Hyde and Hyde* (1866) [L.R.] 1 P & D 130 formula, was not in question in *Re Kevin*. The complications of same-sex marriage were not invoked. It's just that 'man' (and correspondingly, 'woman') — though superficially uncontentious and self-explanatory in the majority of situations — become uncategorisable at the margins.

Similarly, the impact of 'incomplete' re-assignment is deliberately left out of the analysis by mutual consent. The sequence of re-assignment accessed by Kimberley in becoming Kevin included surgical

⁵ The construction of the term '*un(e) stripteaseuse travesti*', containing, as it does, its own syntactic ambiguity — do you ascribe a masculine or feminine indefinite article to a conflation of two nouns, one feminine and one masculine — is deeply symbolic of the very problem which the article engages.

⁶ Throughout this article, Kevin is referred to by the use of the pronoun 'he' unless the context or clarity requires an alternative usage.

⁷ The question of the delimiting point in transition between sexes is discussed in detail in *Bellinger v Bellinger* [2001] EWCA Civ 1140 at 100ff, where *The Report of the Inter-Departmental Working Group on Transsexual People* is considered by the President, Dame Elizabeth Butler-Sloss and Robert Walker LJ at [91]ff. The entire question of what might constitute 'complete' re-assignment from a legal perspective is elided by the way in which Kevin's case was argued and decided.

interventions which had the effect of ‘defeminising’ Kimberley. He had undergone a radical hysterectomy, bilateral oophorectomy and bilateral mammary liposuction. He had also undergone endocrine treatment which produced a ‘masculine’ balance of sex-related hormones, asserting itself in the form of observable secondary sexual characteristics consistent with maleness. Vocal changes and male patterns of body and facial hair (at least) stamped Kevin’s appearance to the world as a man (to the extent that, and in contradistinction to the disposable faux-feminine accoutrements of Aznavour’s character) everyday life was possible, for Kevin, *only* by the adoption of an uncontradicted and undiscardable masculine persona.

Conversely, Aznavour’s stripper’s appearance as woman is, self-confessedly, a deception, revealed in the climax of the dance:

I do a very special show
Where I am nude from head to toe
After stripteasing
Each night the men look so surprised
I change my sex before their eyes
Tell me if you can
What makes a man a man.

This is the vaudevillean ecdysiasis — the discarding of the paraphernalia of the feminine is revealed (literally) as illusory: a magician’s trick of smoke and mirrors (such is the ambience of Parisian clubs) — a *trompe de loil* of couture, coiffure and maquillage. Now you don’t see it — now you do.

The domain of the possible

The deception, though, has temporal and functional limits: after the show (and after the afterparty):

My masquerade comes to an end
And I go home to bed again
Alone and friendless.

Such performativity maps to Butler’s ‘masquerade’ of gender enforced in a ‘subtle and political’ domain, subject to the ‘splittings, self parody, self-criticism’ which, through their hyperbolic nature, reveal the ‘fundamentally phantasmatic status’ of the illusion of gender (Butler 1990: 146).⁸ For Kevin, however, the meta-discursive commitment implicit in re-assignment removed from the domain of the possible a return to the quotidian operations of his pre-intervention sex — there is (now) no masquerade to come to an end. His beard, his physique, his voice preclude any vacillation before the wardrobe *or* the toilet door. As Chisolm J observed, ‘his male secondary characteristics were such that he would have been subject to ridicule if he had attempted to appear in public dressed as a woman . . . [and he could not have] attempted to use a women’s toilet’ (*Re Kevin* [36]).

Kevin, however, had not proceeded with any form of surgical ‘masculinisation’. though defeminised, he had not undergone constructive phalloplasty or testicular prostheses. For forensically strategic reasons, neither side had raised the extent of assignment. For Kevin, the argument that he was a man would seemingly be undercut by the absence of (even surgically) created male organs. For both, the precedential value of a decision so easily distinguished on its facts would be greatly diminished.

At its most basic then, *Re Kevin* might be conceived as an exercise in statutory interpretation. The terms ‘man’ and ‘woman’, no longer an uncomplicated binary, would be subjected to the scrutiny of law. Set in

⁸ It is beyond the scope of this article to engage with observations of ‘critical ambivalence’ (Halberstam 2012: 343), or the tension between ‘the stabilization of the category of woman and the undermining of the coherence of the category within queer theory’ (Halberstam 2012: 336).

opposition are the conservative assumptions about marriage and sex articulated both expressly and implicitly by Lord Justice Ormond in the leading case on the question, *Re Corbett*, and a more sophisticated assessment of the underlying meaning of maleness.

That conservative frame is focussed in a widely-quoted passage from *Corbett*. In determining what makes a man a man (or a woman a woman), Lord Justice Ormrod considered:

... the criteria must, in my judgement, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage (*Corbett* 1324-1325).

Absent a role which is paradoxically both essentialist and utilitarian, the transsexual (described by Lord Justice Ormrod with barely concealed disgust for the perverse anatomical interplay of the Corbett *bourdoir* [*Cossey per Martens*] 644]) is cast as the new leper, re-iterating the 'game of exclusion' which, as Foucault observed, had been played out over two to three hundred years in an oddly similar fashion, periodically re-targeted on the poor, the vagrant, the prisoner, the 'alienated' ... *les etranger* remodelled to the fashion of the age (Foucault 2006 *cf* Butler 2001).

The reluctance of courts to traverse the 'many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics' (*Littleton v Prange* [225]) has been defended by reference to a narrow positivism:

... courts are wise not to wander too far into the misty fields of sociological philosophy. Matters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores. Such matters though are beyond [the] court's consideration. (*Littleton v Prange* [225])

Bio-logic

The approach in *Corbett* appears to construct a continuum of deviant sexuality, decoupled from normally-constructed masculinity, through mere hormonal imbalance out as far as 'the most extreme' degrees of transsexualism. Alternative constructions of maleness — indicia beyond the immediately definable triumvirate of gonads, genitals and chromosomes — were rejected, despite far more extensive taxonomies of developmental variables of sex having been identified, for example, by Money in 1968 (Fletcher 2006).⁹ Most particularly, psychological and the psycho-social phenomena were condemned undifferentially as more than mere oddity or aberration (although there is an air of the freak-show): they were constructed as mental illness — unable to transcend the Freudian 'anatomy as destiny' which informed LJ Ormrod's forensic distinction between the sexes (see Freud 1912). Presumably, the transvestite (typified by Aznavour as a mincing homosexual mimicking femininity) and the 'true-transsexual' (whose libido object is a person of the opposite (perceived) sex) are nonetheless united in law by the quirk of birth anatomy and their departure from the (hetero-) normatively and forensically orthodox. Transsexualism (even in its pre-operative manifestation) is not a homosexual phenomenon, but rather a heterosexuality decoupled from, and confounded by, the implications of gross anatomy, and beyond the scope of the legal imagination.

Behind the façade is the assumption of an unrelieved bimodal state of human sexuality. Male and female — concepts of impeccable Scriptural authenticity (*Genesis*: 1:27) — are reflected in the reified polarities of a two-valued legal taxonomy, themselves manifestations of Foucault's construction of the co-ercive

⁹ Such taxonomies (see Money 1994 [1968]) are a point of reference in US Courts in the classification of 'sex differentiation conditions' (see Fletcher 2006: 540).

suppression of the complexity of human identity by modernity (see Wilkin 1999), or the (arbitrary) 'frozen frames' of Hocquenghem's 'unbroken and polyvocal flux' (Herzer in Eribon 2004). *Corbett's* reliance on expert medical evidence pre-supposes (or at least pretends) that the bio-logic of scientific taxonomy parallels a sexual binary opposition. Such a bio-logic, within the legal imaginary, is constructed as an inherently stable phenomenon, as opposed to, for example, an 'identity tenuously constituted in time ... instituted through a stylized repetition of acts' (Butler 1988: 140).

But the medical evidence was, in one sense, of anything but the binary. The scientific view, expressed in the evidence in *Corbett*, was that medical evaluation was not directed to 'determining' which of the two values an individual was — that is the realisation of a forensic classification harmonised with a binary biological determinacy. Rather, it spoke to the ultra-pragmatic (and humanitarian) assessment of which of the *social* roles associated with those reified concepts best suited the bio-reality of an individual's specific positioning in a multivalent biological schema. Toilet doors may come in only two *forms*; people don't. In Foucault's terms (Wilkin 1999), the diversity of the human condition (and both self- and medical reportage) is reduced to legal monologue. The bipolarity conveniently morphs from medical pragmatism into the simplified black and white legal-logical space underpinning not just *Corbett*, but the sequence of subsequent cases which remained wedded to a binary forensic determination which contradicts biological diversity.

Corbett's presupposition of 'true sex' leads to a primacy of ordinariness in the forensic restructuring of human sexual identity — humans ordinarily emerge at birth as uncomplicatedly male or female, rendering the ascription of sexual identity 'so self-evident as to be trivial' (Fletcher 2006: 536), to the extent that '[e]very schoolchild, even of tender years is confident that he or she can tell the difference' (*Littleton v Prange* [1]). The assumption is that even the extra-ordinary must be consistent with binary organisation, or at least that it can be made (through an act of analytical forensic violence) to conform to this legal fiction. Kevin must, it seems, live in the profoundly satirical world of Crouch's *Gendercator*, where:

[s]ex roles and gender expression are rigidly binary and enforced by law and social custom ... one where butch women and sissy boys are no longer tolerated — gender variants are allowed to choose their gender, but they must choose one and follow its rigid constraints. (Crouch 2007)

Yet it is in the extra-ordinary that the validity (or at least the limits) of forensic ascription needs to be tested.

A fourth *état*?

In *Corbett*, the indicia were selected ostensibly because they represented an exhaustive set of anatomical dimorphism, unambiguously differentiating individuals where congruent. All else was consigned to the aberrant — either the forensic nether-world of intersex, or the psychopathology of deviant sexual orientation. In *Re Kevin*, though, the cosy security, of *Corbett's* bimodality yields to at least the possibility that sexual identity might not be settled at birth, nor confined wholly by Lord Justice Ormrod's troika of chromosomes, gonads and genitals. Most particularly, the self-ascription of the transsexual to their counter-gender, dismissed as mental illness in *Corbett*, has been recharacterised as something beyond psychopathology — beyond even the psychological to something rooted profoundly in the physiological. In the 1998 case of *X Y and Z v UK*, the European Court of Human Rights had recognised the view that:

transsexuality is not merely a psychological disorder but has a *physiological* basis in the structure of the brain (167).

The medical evidence, published by Zhou, Hofman, Gooren et al in *Nature* (1995), pointed specifically to a site of physiological dimorphic differentiation within the brain, deeply implicated in the phenomenon of transsexualism, identified as lying in the bed nucleus of the *stria terminalis*. The spectre of psychopathy is relieved by the acknowledgement that 'transsexuals [might] be right in their belief that their sex was wrongly judged at the moment of birth' (Zhou 1995: 69).¹⁰ and the existence of sexually dimorphic neurological structures which point inexorably (or at least as cogently as karyotype, gonads or genitals) to one of the polar states of sex

This evidence was accepted by Chisolm J as reflecting the existence of a fourth sexually dimorphic structure within human anatomy. But, if the three determinative indicia of *Corbett* have simply been amplified, then ultimately the balance of judicial decision-making remains largely unaltered. *Corbett's* trio resolves into a quartet, but that merely shifts the point of ambiguity to a different site. A fourth element may extend the potential range of non-congruence (so that an individual who is congruent across *Corbett's* indicia may well be found non-congruent across all four), but in itself does nothing to change the underlying oppositions. A new physiological 'test' emerges, re-inforcing the anatomical primacy of *Corbett*.

Of domestic chores and macho sports

Kevin was born (within the static formula of *Corbett*) unambiguously female. At birth, the (then) Kimberley presented with congruent observable dimorphic forms. Her gonads, genitals and karyotype pointed uncomplicatedly to the birth of a non-anomalous *girl*.

Between birth and puberty, however, the comfortable assumptions of gender identity slipped. Kimberley, though *Corbett*-congruent and observably female, nevertheless began to demonstrate behavioural 'anomalies'. Physiology (or at least the confined construct created by *Corbett's* analysis) failed to yield an identity consistent with anatomical destiny.

A range of evidence was presented to the court about Kimberly's behaviour: a male cousin testified that they would play 'footy, soccer and cricket, and ride BMX bikes on family outings'. Close friends and relatives gave consistent evidence of his predilection for the aggressive play of male children (rather than the co-operative social play of girls) (*Re* [48]-[66]).

Contemporary acquaintances described the current Kevin — his appearance, physique, mannerisms, speech, attitudes and interests as 'expressing his maleness' — epitomised, perhaps, by a friend's characterisation as 'a typical Aussie bloke'. His adult persona was lauded as a 'fine husband and father', even to the point of the judgement of his mother-in-law: there was 'no other man, anywhere, who I would prefer to have as my daughter's husband'.

But it is this body of evidence which lies at the source of the another tension — which creates a paradox (if not at the individual level, but at the level of sexual politics.) The characterisation of individuals by reference to sexual stereotypes — the heteronormative ruggedness of masculinity as counterpoint to the gentleness of the feminine — has long been abandoned as a valid basis for inference from behaviour to identity (Cover 2004). Homosexuals do not inevitably conform to the stereotypical traits of Aznavour's ecdysiast fag, nor lesbians to the boilersuited butch of TV drama. The idiosyncratic manifestations of gender — the actual masquerade of Aznavour, or the masquerade imposed by the legal imaginary on Kevin, invite a bilateral form of the question posed by Butler: does 'masquerade conceal a femininity

¹⁰ Wallbank (2004) sets out the three major 'competing' theories of the aetiology of transsexualism: the Non-Conflictual Psychological Theory and the Conflictual Psychological Theory, both of which identify transsexualism as a pathological condition, differentiated by the extent to which the former is 'fixed' as a developmental characteristic (and thus untreatable) or persistently ambiguous (and thus treatable) and the Biological Theory (which identifies transsexualism as deriving from anatomical dimorphism [see Zhou 1995]). No theory is, as yet, conclusive (see Wallbank 2004).

(/masculinity) that might be seen as genuine or authentic, or [is] masquerade ... the means by which femininity (/masculiniity) and the contests over its “authenticity” are produced?’ (Butler 1990: 159).

Couture, coiffure and maquillage

It is, perhaps, on the basis of performativity that Kevin is most pointedly to be distinguished from the vaudevillian transvestite stripper: Aznavour’s entertainer is (quintessentially) performer. His stage persona persists as stereotype after any after-party performance:

We love to pull apart someone
And spread some gossip just for fun
Or start a rumour

Kevin, by contrast, wears no mask — no wig. Kevin is the embodiment of Prosser’s ‘transsexual who seek[s] very pointedly to be non-performative, to be constative, quite simply to be’ (Prosser 1998: 32).

Yet, it is precisely these heteronormative behavioural tropes which form the counter-technological riposte to the forensic ascription of anatomical and chromosomal determinism which must be overcome if Kevin is to marry. And in doing so, they become as entrenched in forensic discourse as Ormrod LJ’s biologic.

Justice Chisolm’s ‘absurd’ pre-occupation with Kevin’s childhood behaviours realises, and re-imagines out of the domain of the homosexual into that of the transsexual, Eribon’s characterisation of nineteenth century analyses of the ‘uranist’ as a ‘a personage, a past, a case history and a childhood, a character-type, a form of life’ (Eribon 2004: 47). It is also, to continue with Foucault, a ‘morphology with an indiscreet anatomy’ (Foucault 1990: 43), where law’s discomfort with the transsexual literalises Foucault’s ascription of a ‘mysterious physiology’, outside the visual or conceptual horizon of the legal imaginary. But it equally re-imagines — if not re-invigorates — the perversely prescient construction of the *homosexual* in Ulrich’s model of the ‘hermaphroditism of the soul’, *mutatis mutandis* the ‘woman’s soul in a man’s body’ (Cairns 1996: 582).

Conclusion: The wounded other

What is at stake in the counterpoint of law and anatomical morphology is the recognition of ‘a way of life [which] can yield a culture and an ethics’, much as Foucault ascribes these phenomena to ‘gayness’ (Foucault 1997: 138). Such a culture need not — indeed must not — be constrained to the identification with defined psychological traits, visible masks or the veil of the legal subject.

Nobody has the right to be
The judge of what is right for me
Tell me if you can
What makes a man a man.

The inscription — or re-inscription — of legal personality onto the body of the transsexual manifests the hermeneutical function of the Foucauldian judge-as-judge. The confessional processes which illuminate the person behind the body — the self-surveillance and narrative consequence — is neither a free-standing self-determination nor a functional discourse of the self. For Foucault, the confession (the discourse of the symptom) is but a precursor to the surveillance and classification of a truth which cannot, politically, be known by the subject, but must be deciphered as the ‘truth of this (now) obscure truth’, the listener-judge acting as the ‘master of a truth’ laid bare and evaluated before a public tribunal demanding proof by a metaphorical (or metonymic) striptease (Foucault 1990: 66).

To the extent that such an ecdysiasis reveals the *body/mind* behind what is cynically assumed to be a mask, its roots in stereotyped behavioural signs are perhaps no more convincing than Aznavour's glittering evening gown. The micro-surveillance and interrogation to which the confession is subjected — a disciplinary project which manifests Bersani's observation that 'to be seen is to be policed' (Bersani 1996: 12)¹¹ — cannot be dissociated from the production, multiplication and concretisation of the legal taxonomy to which reality is inevitably reduced. In doing so, the legitimisation (or, perhaps, establishment) of the transsexual in the legal imaginary as a defined, or definable, category risks a reversal of Hocquenghem's plea that *les étranger* should themselves 'uncover the desire which we have been forced to hide' (cited in Eribon 2004: 62), ceding to the court Nietzsche's 'lordly right of giving names' (Nietzsche 1989: 26).

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¹¹ Bersani's analysis is, of course, directed to homosexuality ('gayness'), yet the observation remains apposite across the spectrum of human sexual identity.

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Self-help Groups for Human Trafficking Victims in Vietnam: An Innovative Program Model

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Conference subtheme: Critical victimology

Abstract

Human trafficking has a devastating impact on victims. Because of physical and psychological harm, victims need special care from community and government agencies to support their recovery. Once the immediate health and welfare needs of the trafficked person have been met, some victims will require further assistance to truly reintegrate into their communities. In Vietnam, a self-help group model has been successfully used to assist victims. Utilising a unique peer group model with support from service providers, trafficked persons can provide mutual psychosocial support, access services, and develop income sources by collaborating on income generating activities. This paper draws on literature, legal documents and interviews with government staff in anti-trafficking programs to: overview human trafficking in the region, review the Vietnamese legal framework for defining trafficking victims and victim support, explore the benefits of self-help group activities, and propose practical recommendations for the development of group activities.

Introduction

Vietnam is a member of the Association of South East Asian nations (ASEAN) where the issue of trafficking in persons has been on the agenda since the early 1990s. The number of publications about the nature and diversity of trafficking in persons in South East Asia has risen rapidly over the past two decades (David 2009: 95; Piper 2005: 203-204). In this region, women, men, girls, and boys are trafficked and exploited in a wide range of industries and settings. Moreover, information about other forms of trafficking, such as trafficking for the purposes of organ removal are now being investigated (David, Gallagher, Holmes et al 2011: 1). However, limited information about practices in the criminal justice and victim support sectors leads to difficulties in assessing impact and effectiveness of responses (David 2009: 96-97).

In Vietnam, the statistics indicate that human trafficking is now an established practice. There were 4026 cases and 8641 victims of human trafficking identified between 2005 and 2014, with the number of cases increasing steadily over this period (see Table 1). Vietnamese victims are trafficked for sexual and labour exploitation across the globe, including to Taiwan, Malaysia, South Korea, Laos, China, Thailand, Saudi Arabia, Libya, Indonesia, and the United Kingdom (Hoang 2013: 169-170). Some Vietnamese women are recruited through international marriages (between Vietnamese women/girls and foreigners) to move to China, Taiwan, Hong Kong, Macau, and South Korea. These fraudulent and exploitative marriages are also linked to trafficking in women and prostitution with around 10 per cent of women in these marriages sold and subsequently subjected to conditions of forced labour (including as domestic servants), forced prostitution, or both (Hoang 2013: 171; Shelley 2010: 165).

Table 1: Number of human trafficking cases and victims (Vietnamese Ministry of Public Security year-end summation reports (2005-2014))

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	Total
Cases	209	328	369	375	395	429	458	487	507	469	4026
Victims	499	966	938	981	869	671	821	883	982	1031	8641

It is reported that Vietnamese men and women incur some of the highest debts among Asian expatriate workers. One of the main reasons for this is that they migrate by using state-affiliated and private labour export companies for work opportunities. In such situations they can be coerced into signing contracts in languages they cannot read and/or charged fees illegally. These situations contribute to increased risk of debt bondage and forced labour (US Department of State 2013: 392-395).

Interpol Vietnam reports that the vast majority (60 per cent) of the cases of trafficking occur at the Vietnam-China border primarily in these provinces: Quang Ninh, Lang Son, Cao Bang, Lao Cai, and Ha Giang. A further 10 per cent occur at the Vietnam-Cambodia border, mainly in the provinces of Tay Ninh, An Giang, Dong Thap, Hau Giang, Kien Giang. A smaller 6 per cent of the cases occur at the Vietnam-Laos border, mainly in provinces of Thanh Hoa, Nghe An, Ha Tinh, Quang Tri (Interpol Vietnam 2013). However, these reported instances of trafficking do not depict the whole picture of human trafficking in Vietnam because of the absence of systematic and complete data (Vu 2006: 33-34). Moreover, the effectiveness of strategies to prevent this kind of crime remain limited (Trees, Vu and Tran 2012; Vu 2007).

As a consequence of the alarming increase in trafficking cases, hundreds of victims are also returned to Vietnamese society annually. Based on the number of victims identified, there is a need to improve victim protection regimes and develop victim support programs in Vietnam. The following sections will clarify the Vietnamese legal framework and the self-help group model for supporting victims.

Trafficking victims definition under Vietnamese law

Before 2011, there was no comprehensive trafficking law in Vietnam and Vietnam's *Penal Code* was the only law that criminalised acts (Kneebone and Debeljak 2012: 151). The *Vietnamese Penal Code 1999* includes two main articles which provide for the criminalisation of trafficking offences. They are Article 119 – 'Trafficking in women' and Article 120 – 'Trading, fraudulently exchanging or appropriating children' (Vietnamese National Assembly 1999). The terms 'trafficking', 'trading', 'fraudulently exchanging' and 'appropriating' were not defined in the *Vietnamese Penal Code* but in explanatory memoranda, law enforcement documents, or related regulations (Kneebone and Debeljak 2012: 151-152; Vietnamese National Assembly 1999).

The term victim of trafficking is not defined in any provision of the *Vietnamese Penal Code* (Vietnamese National Assembly 1999) but rather in the *Government Decision 17/2007/QĐ-TTg on Promulgating the Regulations on Reception of and Community Reintegration Support for Trafficked Women and Children Returning Home from Foreign Countries*. Here, victims are defined in this regulation as:

[...] women, children threatened by a person or a group of people resorting to force, threatening to employ force or other types of force, kidnapping, deceiving or misusing their power or position, the vulnerable condition to traffic (deliver, receive money or another materialistic benefit) to take them abroad on the purpose of human exploitation (forced sex or other types of sexual exploitation, labour or forced slavery service or working under slavery condition or taking their body parts).¹ (Article 4)

It has been said that trafficking under Vietnamese law focuses on 'trade, profit and illegality'. This *illegal trade* means a transfer of a person from person/people to another person/people for money or other material profits (Department of Criminal and Administrative Laws 2004: 12). Moreover, anti-trafficking practice has mainly focused on the trafficking of women and children (Hoang 2013: 211).

¹ Translations of legislation and interview transcripts were undertaken by the authors, who also conducted the interviews. Artefacts of translation to English may remain.

In the *Amended and Supplemented Penal Code 2009*, a change was made from 'trafficking in women' (Article 119 in the *Penal Code 1999*) to 'trafficking in humans', and 'removal of organs' was added. These changes have brought Vietnam closer to achieving compliance with the international definition of trafficking (The Vietnamese National Assembly 2009). However, the understanding of trafficking is still narrow in comparison with the *Trafficking Protocol*, and some practices, such as forced labour or labour exploitation, were not added (Tucker, Kammel, Lehman et al 2009: 458).

In 2011, a new law entitled *Law on Prevention and Suppression against Human Trafficking (Anti Trafficking Law 2011)* appears to officially define trafficked persons as victims and covers both international and internal trafficking (Kneebone and Debeljak 2012: 153). Trafficking is defined in Article 3 of the law by the following 'prohibited acts', namely:

1. The trafficking in persons as stipulated in Article 119 and Article 120 of the Penal Code.
2. The transfer or receipt of persons for sexual exploitation, forced labour, the removal of organs, or for other inhuman purposes.
3. The recruitment, transportation, harbouring of persons for sexual exploitation, forced labour, the removal of organs or for other inhuman purposes, or for the commission of the acts as stipulated in paragraphs 1 and 2 of this Article.

It should be noted that the 'prohibited acts' under this legal document is not consistent with the 'means' element of *Trafficking Protocol*. There are only some 'means' factors described in the definition of some types of exploitation, including: 'coercion' in 'sexual exploitation'; 'force' in 'sexual slavery'; and 'the use of force' or 'the threat of use of force' or 'other means to coerce persons' in 'forced labour'. The meaning of 'the abuse of power or of a position of vulnerability', which is seen as very common means in Greater Mekong Sub-region, is not detailed in this anti-trafficking law (Hoang 2013: 192, 216; Kneebone and Debeljak 2012: 152). Furthermore, the law lacks a strong commitment to suppress trafficking for forced labour as well as a commitment to not punish trafficking victims for illegal activities they may enter into, such as illegal residence in countries of transit or destination (Hoang 2013: 212-217). Additionally, no guidance is provided in this document on whether the *Anti-Trafficking Law 2011* supplements or replaces the criminal code provisions or regulations (Kneebone and Debeljak 2012: 153).

To summarise, Vietnamese anti-trafficking policies make a positive step towards compliance with international standards and will provide Vietnam with powerful means of supporting human trafficking victims. Recent significant changes, including the improvement of definitions of human trafficking, have further strengthened the federal Vietnamese position (Tucker, Kammel, Lehman et al 2009: 461-462).

Victim support under Vietnamese law

The purpose of victim support is to help trafficking victims recover from physical and psychological problems, provide legal assistance, protect them from further harms, assist them in their return and social reintegration, and protect them from being re-trafficked (*Cambodia-Vietnam Agreement 2005*, Article 13; *Trafficking Protocol*, Article 6). This section will review the policies of victim reintegration and protection.

Reintegration support is an important requirement for trafficked persons under international law (Hoang 2013: 249). Under Vietnamese anti-trafficking policies, the purposes of these resources are to provide: essential needs and travelling expenses; medical and psychological support; legal aid; short-term allowances; educational and vocational training; and loans, which can help victims return and reintegrate into their families and communities (Vietnamese National Assembly 2011: Chapter V, Article 33 to Article 38). The support for essential needs and travelling expenses, which are determined in *Anti-Trafficking Law 2011*, includes temporary housing, clothing, food, necessary personal tools, and expenses for transit fares and food for victims' travel to return to their places of residence (Vietnamese National Assembly

2011: Chapter V, Article 33). The medical and psychological support is provided through social welfare institutions or victim support institutions. This include 'health care and/or medical treatment expenses' and support to help victims 'have their psychology stabilized' (Vietnamese National Assembly 2011: Chapter V, Article 34 and 35). Additionally, victims of trafficking in Vietnam are entitled to legal aid to 'apply for permanent residence registration, civil status registration, entitlement to supportive regimes, to claim compensation, and to participate in litigation and other legal procedures in connection with the human trafficking cases' (Vietnamese National Assembly 2011: Chapter V, Article 36). Trafficking victims who are Vietnamese citizens or stateless persons permanently residing in Vietnam may be eligible for educational and vocational training (including tuition fees and expenses for the purchase of textbooks and school items for the first school year) if they are 'minors in poor household families', or short-term allowances or loans for 'overcoming difficulties', 'if they are poor household family members' (Vietnamese National Assembly 2011: Chapter V, Article 37 and 38). From these policies, it is clear that Vietnamese trafficking victims are entitled to a wide range of support for their reintegration process. Another significant development is the expansion of victim services from women and children to all trafficked persons, which is more in line with international requirements.

However, many of these types of support are only in-principle. There is a lack legal guidance for implementation from government agencies (Hoang 2013: 267). One example is legal aid. Trafficking victims were not defined as free-of-charge candidates in the Vietnamese Law on legal aid in 2006 or the guidance published in 2007 (Vietnamese National Assembly 2006: Article 10). This policy was only amended in 2013 to include situations of trafficking. Legal aid still cannot be undertaken effectively because of insensitive support measures. Self-returnees who are often not identified as victims cannot receive free legal aid support. Therefore, there are challenges in their application to be identified as victims and as eligible for government support. As found in a 2013 study, only a small portion of trafficked returnees (around 22 per cent) received legal support from the government, including obtaining permanent residency registration, identity cards, and birth certificates for their children (Hoang 2013: 259, 267). Moreover, some policies are not tailored to the needs of the trafficking victims in Vietnam. For example, only victims in 'poor household family' can access educational and vocational support or bank loans. The other types of victims and trafficked self-returnees without governmental identification documents cannot access those supports; this can lead to a lack of protection against being re-victimised (Hoang 2013: 294). Lack of medical and health care equipment, vocational training centres, and funding also means that the majority of returnees go straight back to their communities without support from the government. For example, comprehensive services are not available at shelters so victims prefer to return home (Surtees 2013: 97-193). Therefore, some of the anti-trafficking policies appear comprehensive on paper but fall short in practice.

The establishment of self-help groups

This model was developed by Ministry of Labour, War invalids and Social Affairs (MOLISA) and sponsored by International Organization of Migration (IOM) in 2008. The first group was established in Bac Giang (in the North of Vietnam) in 2008 and then expanded to Tay Ninh (in the South of Vietnam) in 2011, and to Thua Thien Hue (in the Middle of Vietnam) in 2012 (MOLISA 2014: 1).

There is no legal definition of 'self-help group' and its explanation in reports or training documents is quite general. In a 2012 report, self-help group was defined as:

The self-help groups were established to provide assistance to trafficked persons who are from provinces without assessment centres (or victim support centres) and have returned to their homes without support or services. The facilitated self-help groups provide psychosocial support through monthly meetings, where women with similar experiences share what happened to them, often the first time they have talked about their experience. The women are identified by an outreach team and their involvement is

voluntary. The self-help group model also includes support through a reintegration plan and financial assistance (Trees, Vu and Tran 2012: 31).

It can be seen that the original purpose of the model is to provide support for trafficked women, not men or children. However, the identification of trafficked men leads to the need to establish self-help group for these victims. Currently, there are nine self-help groups (one for men) in three provinces with 102 women and 10 men participating (MOLISA 2014: 3). The following section will discuss research method, and self-help activities and their benefits based upon interviews with governmental staff and official reports.

Research method

The data was gathered through semi-structured interviews with individuals selected from key Vietnamese agencies involved in the plan to support human trafficking victims. Qualitative methods are suited to collecting rich, quality information on sensitive topics with people whose 'voices' are rarely heard (Liamputtong and Ezzy 2006: 81). The semi-structured interviews facilitate the research in capturing deep and comprehensive experiences of staff who have participated in the supportive measures. The interviews were guided by a set of general questions or themes, and were not rigidly structured. Within these interviews, open-ended questions were asked as they allow the respondents freedom in their responses and this provides a richness of data (Bryman 2008; Arksey and Knight 1999).

There are two key agencies participating in the support of human trafficking victims. They are Ministry of Labour, War invalids and Social Affairs, and The Vietnam Women's Union. In each agency, four staff were interviewed, including two operational staff who directly deliver the projects, one liaison staff member in charge of reports, and one leader who supervises agency activities. In addition, two retired staff from two agencies were also invited to participate in interviews. The reason for interviewing retired staff is that they are no longer tied down by the working environment and may feel freer to state their opinion; they arguably may provide more intensive and unbiased information.

The benefits of group activities

Firstly, the greatest benefit of group activities is restoring victim self-confidence, self-efficacy, and self-esteem. The groups meet monthly to discuss issues such as life skills, trafficking and prevention, reproductive health and safe sex. Victims may also share personal life, family information and get advice from their peers to overcome difficulties. The meetings are supported and monitored by provincial governmental staff in the Department of Social Evils Prevention (DSEP), which belongs to MOLISA. It is believed that these group activities are extremely beneficial. A staff member in DSEP stated:

The self-help groups help victims to be more confident about their future. They learn life skills from other peers. This helps them to understand the value of life and know how to overcome obstacles. Moreover, they can build up and expand many social relationships so they share experiences with their peers and help each other. Now, most of them are active in recognising and dealing with difficult situations.

Another example of this benefit was explained by a group organiser:

Self-help group members can integrate into communities more easily than other victims. They are confident in sharing their experiences and thoughts in the meeting or training course.

Secondly, the model provides valuable economic assistance. Each group member received financial support from the IOM for their reintegration plans (around US\$150 before 2012 or US\$350 since 2012). While financial support for victims in Vietnam is very limited as mentioned before, this support is highly significant for them to start their own businesses. Moreover, discussion of business plans and financial

management between group members in the meetings helps them to develop and implement their plans. As a result, many of them could raise additional income, pay off their debts, and secure their family livelihood. A government staff member noted:

The group meeting helped victims to gain additional knowledge about small business, farming, and breeding. Therefore, they could earn an income and improve lives for them and their family.

Economic assistance is often a primary need in the victims' reintegration process (Surtees 2013: 146). In a 2013 study, Surtees indicated that there were many economic problems which trafficked persons faced before, and as the result of, trafficking. In countries of the Greater Mekong Sub-region in general, and Vietnam in particular, victim situations could not be improved without economic assistance and victims cannot personally compensate for the damage (Surtees 2013: 146-159). It is believed that financial support for self-help group members is an important factor to help victims to truly integrate into communities and prevent re-trafficking.

Other advantages of the groups include using victim experiences to provide trafficking information and support communities. In the whole country, despite the fact that number of self-return victims is thought to be enormous, identifying them as trafficked persons is challenging (Hoang 2013: 252). Their access to support services is also limited because of inadequate provision of information or barriers around administrative requirements and procedures (Surtees 2013: 85-94). However, in three provinces that have self-help groups group organisers and members were successful in identifying potential trafficked persons and providing information. While DSEP staff can help self-returned persons to complete necessary documents and bring the case to courts, counselling from self-help group members is more effective than other types of support. An interviewee explained:

Trafficked victims are often ashamed, embarrassed to share their experiences with their family members, community, or governmental staff. However, they feel much better to discuss with people who have similar situations. It is easier for them to talk about their trafficking case and their needs.

Self-help groups are also sources for the provision of information and its dissemination for education purposes. Group members are powerful collaborators in education networks and awareness campaigns. In fact, many people have economic problems and they think that working in another country is paradise. They may trust traffickers, but not governmental staff or social media. In those cases, victims in self-help groups become empirical examples of human trafficking. When they participate in awareness raising campaigns, their explanations about risks of being trafficked are easily accepted by communities. A DSEP staff member illustrated this:

Public awareness of human trafficking is clearly increasing after seeing real examples of self-help group members. The community now is vigilant against traffickers. Therefore, many people consider working or doing small business at their home town.

In conclusion, the self-help group model is effective in supporting trafficked persons, including psychosocial support, counselling, and access to information and referral services. Financial support and group discussions provide important opportunities for victims initiating small-businesses. In addition, group members become competent collaborators in the provision and dissemination of information and community education about human trafficking.

Suggestions for improvement

The respondents in this study made suggestions about ways to further enhance the effectiveness of group activities. Group organisers and members should be given further training in counselling. Staff that monitor and provide support for the monthly meetings do not have much professional experience in this type of support. Therefore, the effectiveness of the model can be limited. As one facilitator explained:

I am holding many positions and working with self-help group is not my main responsibility. Understanding trafficked victims and persuading them are not always easy jobs. I love this job and I am trying to help them. That why I need more training courses to improve my counselling skills.

Another staff member recommended:

DSEP should seek staff that have knowledge about victim support and avoid changing them frequently. Group organisers should be met annually to discuss and share experiences. Support skills of psychology and counselling also should be trained in the meetings so the staff can do their jobs more effectively.

More importantly, group members lack skills and education in counselling (MOLISA 2014: 7). This effects the discussion and support provide. Therefore, both staff and victims could attend more training courses geared to their level of expertise. This could potentially improve the quality and impact of the groups, as an interviewee explained:

Most trafficking victims are poor, have poor education and experience unemployment. Therefore, they do not know how to earn money from financial support and how to help other victims. If they can be trained those skills, group discussion will be intensive and effective.

In addition, funds for reintegration plans should be allocated from not only international but also national budgets. IOM funds which currently support the group may be terminated in near future (MOLISA 2014: 13). The groups should be more independent and not rely on one external funding body to ensure the future continuation of their activities. In the meantime, available funds should be leveraged to benefit more victims. An interviewee recommended:

The model depends on external funding. In my opinion, both internal and external funding should be sought for the next periods. It is very important to remain group activities. Private companies and individuals can contribute to the project funding.

Conclusion

Since human trafficking and its victims were identified as an issue in Vietnam, they have attracted the attention of Vietnamese government and international organisations. Not only has legislation on human trafficking has been improved, but victim support programs have also been deployed. The operation of self-help groups is effective in providing psychological and reintegration support. The model also helps to reach larger number of victims who are not identified by the government, and provides education to the wider community. However, there are some clear directions for improving support in the future.

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India's Sexual Harassment Law: Rendering Tokenism?

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Conference subtheme: Sexual assault and harassment

Abstract

Sexual harassment in the workplace is part of the struggle faced by Indian women today in trying to challenge their traditional identities. With crimes against women like rape on the rise (Philip 2014), sexual harassment is still considered too trivial to be an 'Indian' issue. Shockingly, in a recent Australian case, a court in Tasmania accepted that due to the influence of Bollywood movies, it is part of the common Indian male psyche to believe that obsessive pursuit of a woman is tantamount to wooing her (Pearlman 2015). It is not very surprising that India, until recently, had no law on sexual harassment despite a Supreme Court decision in 1997 regarding the gang rape of a woman due to the failure of officials to investigate her initial complaints of harassment (*Vishaka v State of Rajasthan* (1997) 6 SCC 241). This legislative vacuum has now been filled by the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013*, a law largely transplanted from the United States. However, like sexual harassment laws of the West,¹ a feature of the new legislation is that sexual harassment has to be 'unwelcome' and non-consensual. It is important to acknowledge that India's views on women's freedoms are not as progressive as Western nations, and the judiciary is structurally rooted in a similar cultural framework. Given this background, is it realistic to expect the judiciary to interpret 'unwelcome' conduct from a modern, progressive perspective of gender rights? This paper discusses the new legislation and assesses its likely impact on the social and legal system in India.

Introduction

Sexual harassment jeopardises the safety of women and men in the workplace, imposes costs on organisations, threatens gender equality and reduces the quality of work life. From the 1970s, the subject of sexual harassment gained prominence as part of the feminist movement (MacKinnon 1979).² Although sexual harassment of men occurs, studies reveal that sexual harassment is primarily directed against women, who frequently occupy a less influential place in the labour market (Mccann 2005). Globally, sexual harassment is viewed as both a form of gender discrimination, as well as a form of violence against women. Since 1995, both industrialised and developing countries have enacted specific legislation against sexual harassment (Mccann 2005). Employers and employee groups in these countries have also developed programs to impart awareness on laws relating to sexual harassment (Mccann 2005). However, both the principles of the law and the enforcement mechanisms envisaged to enable its application have been principally transplanted from the West to countries with significantly different cultural perceptions regarding acceptable behaviour towards women.³ This inherent structural mismatch can materially erode the efficacy and impact of such laws in countries like India.

Notions of behaviour amounting to sexual harassment are greatly influenced by societal and cultural prejudices, and gender bias. In India, there remains large scale gender inequality in most places, and women are commonly perceived as the weaker sex. This patriarchal set up renders women in India exceedingly vulnerable to sexual offences (see generally, Malhotra, Vanneman and Kishor 1995). Women in India are not a homogeneous social group. Caste, class, religious, education and community biases

1 See footnote 3.

2 The need for legal protection against sexual harassment was first recognised in the United States when women demanded that sexual harassment be recognised as 'sex discrimination' under federal anti-discrimination law (See generally, MacKinnon 1979).

3 The 'Western' and 'non Western' world is not a perfect system of classification or mechanism of identification. There are many accepted definitions of Western nations and the term is commonly used to refer to Europe and countries of European colonial origin with substantial European ancestral population. Here too, the author is using the term West to mean modern, developed countries with capitalist economies having predominantly white citizens of European ancestry.

result in different forms of aggression against women and violence stemming from tradition, culture and religion include widow burning, dowry deaths, female infanticide and honour killing. In some communities in India, sexual violence is regarded to be an important element in disciplining and punishing women (Rajesh 2010). For instance, *Khap Panchayats* (community organisations composed of all-male village councils, unaffiliated with formally elected government) act as kangaroo courts and order sexual abuse of women as punishment for their actions and those of their families.⁴

In urban India too, the underlying prejudices manifest in similar ways, with the character of the woman victim being called into question in cases of sexual assault. An example of this is a brutal rape case that occurred in an up-market locality of a state capital in 2012. The Chief Minister of the state referred to the gang rape as a 'manufactured incident' and politicians dismissed the victim as a sex worker, claiming that it was not rape but a deal gone sour. Public perception was that the victim, an Anglo-Indian woman, who had consumed alcohol at a discotheque late in the night, had asked for it. This case was compared to other rape cases as a typical illustration of the 'good victim' versus the 'bad victim'.⁵

In the backdrop of patriarchal mindsets where a victim's character, religion, community and caste determine social perceptions of whether sexual violence is an offence — notwithstanding the legal definitions — sexual harassment in the workplace is still considered to be a trivial issue, sometimes a necessary hazard encountered by women who wish to challenge their traditional identities and enter the male-dominated workplace.

Evolution of sexual harassment law in India

Awareness of issues regarding sexual harassment of women started in India almost 35 years ago, as part of the feminist movement. Several women's rights organisations started staging protests against sexual harassment, rampant in sectors like hospitals, airlines, educational institutions and government departments. The initial response to this movement was lukewarm (Patel 2005). At this time, while there were criminal law provisions against sexual harassment, the existing legislation was inadequate and regressive, and reflective of the inherent prejudices regarding gender equality. For example, Sections 509 and 354 of the *Penal Code* (India) criminalised acts which insulted and outraged the 'modesty' of a woman (No 45 of 1860 [*Penal Code*]).⁶ The word modesty had puritan connotations and courts in India grappled for many years trying to define the term. In any case, these provisions offered little protection against sexual harassment and were a far cry from promoting gender equality (Barak-Erez and Kothari 2011).

The campaign against sexual harassment of women gained momentum in the 1990s after the gang rape of a social worker who was an employee of the state government of Rajasthan. The victim, who was protesting against child marriage, had complained to the local authorities about the harassment she was facing from men belonging to the upper caste. The authorities chose to ignore her initial complaints of harassment, which culminated in her rape. A petition was then filed by a women's rights organisation before the Supreme Court of India arguing that working women in India were particularly susceptible to sexual harassment due to the dearth of legal measures for their protection. The petitioners requested the Supreme Court issue specific guidelines against sexual harassment of women in the workplace (*Vishaka v*

⁴ Interestingly, honour killings and other atrocities practiced by Khap Panchayats have been declared illegal by the Supreme Court of India in 2011, in the case of *Arumugam Servai v State of TN* (2011) 6 SCC 405. The Court directed administrative and police officials to take measures to prevent such acts. However, village councils continue to render such barbaric punishments. In August 2015, a Khap Panchayat of Bhagpat village in the state of Uttar Pradesh ordered the rape of two Dalit (low caste) sisters as punishment for their brother's 'crime' of eloping with a married woman of a higher caste. A petition started by Amnesty International against the Khap Panchayat ruling is gathering support (*The Week* 2015).

⁵ In February 2012, Suzette Jordan had gone out with her friends to have a few drinks at a popular nightclub in a five-star hotel in Kolkata, India. By the end of the night, she was thrown off a car onto the street, battered, gang-raped, with her clothes ripped off. Not only was the brutal rape dismissed as a false claim, comments were made about her character, as she was drinking at a discotheque late at night. *Suzette Jordan died at a Kolkata hospital in early 2015*. For a detailed account, see Roy (2015).

⁶ The *Penal Code* states: 'Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both' (§ 509). It also states: 'Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both' (*Penal Code* § 354).

State of Rajasthan (1997) 6 SCC 241 [*Vishaka*]). The Supreme Court, relying on the *Constitution of India* and the *Convention on the Elimination of All Forms of Discrimination Against Women* (GA res 34/180, 34 UN GAOR, SuppNo 46 at 193, UN Doc A/34/46; 1249 UNTS 13; 19 ILM 33 (1980)), issued detailed guidelines (hereinafter referred to as the Vishaka guidelines) describing both quid-pro-quo and hostile environment as forms of sexual harassment. The Court prescribed a host of measures to be taken by employers to deal with complaints of sexual harassment, including the setting up of an internal complaints committee. The Court also asserted that 'The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in private sector' (*Vishaka* 1997 254; See also, Nussbaum 2001).

Unfortunately, the impact of this landmark judgment was limited, the guidelines not being enshrined in legislation. The Vishaka guidelines were reiterated in a few cases like *Apparel Export Promotion Council v AK Chopra* (1999) 1 SCC 759 and *Medha Kotwal Lele v Union of India* (2013) 1 SCC 297 [*Lele v Union*]. In the case of *Medha Kotwal*, the Supreme Court specifically criticised the non-observation of the Vishaka guidelines (*Lele v Union* 2013: para 1). Further, studies conducted by non-government organisations (NGOs) revealed that the implementation of the Supreme Court guidelines remained limited, years after the *Vishaka* judgment (Chaudhuri 2008). In many cases, internal complaints committees had not even been established by employers. In cases where committees were established, they existed only on paper. Some large multinational companies claimed that sexual harassment policies were unnecessary and suggested that courts themselves were reluctant to apply the Vishaka guidelines to the judiciary, claiming that the independence of the latter would be affected (Chaudhuri 2008).

In 2012, a horrifying gang rape of a 23-year-old paramedic student in the national capital created shockwaves throughout India. The sheer brutality of the attack evoked public outrage and necessitated an urgent relook at laws pertaining to sexual violence against women in India. A three-member committee (hereinafter referred to as the Verma Committee) headed by the former Chief Justice of India, Justice JS Verma was established to review India's sex crime laws. The Verma Committee submitted its report in a record time of 29 days and sexual violence in all forms, including sexual harassment of women, was sought to be made illegal. Apart from legal changes, the committee also condemned patriarchal attitudes in general and recommended a crackdown on institutions like Khap Panchayats which legitimised violence against women (see generally, Bhowmick 2013). Pursuant to the Verma Committee Report, the *Penal Code* was amended in 2013 to make inter alia, sexual harassment, stalking and voyeurism punishable offences (*The Criminal Law (Amendment) Act 2013* §§ 354A, 354D, 354C). Along with changes in the criminal law, a civil law by the name of *The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act* (hereinafter referred to as the *Act*) was enacted in 2013 specifically to protect women from sexual harassment in the workplace.

The salient features of the new Act

The new legislation on sexual harassment primarily codifies the Vishaka guidelines issued earlier by the Supreme Court. As is evident from its very name, the legislation is not gender neutral and only protects women who are victims of sexual harassment. The ambit of the Act is wide and it applies to the organised and the unorganised sector though there are doubts as to how effective the law will be vis-a-vis the unorganised sector,⁷ which is largely built on familial relations, contract and home based labour (*NUJS Law Review* 2013). The term 'workplace' is broadly defined and includes transportation provided by the employer for travel during the course of employment (*Act* § 2 (o)). Under the *Act*, sexual harassment is defined as any unwelcome, sexually coloured behaviour, which can be either physical, or verbal, or both. The Act covers both quid-pro-quo and hostile environment harassment. It describes situations that, when coupled with unwelcome behaviour, will amount to sexual harassment. These relate to an implied or

⁷ The terms 'organised' and 'unorganised' as used in India are internationally known as 'formal' and 'informal'. Generally speaking, the organised sector includes government organisations, state-owned and private enterprises, which are registered under national legislation. The characteristics of the informal sector are that these are:

- (a) Private Un-incorporated Enterprises (Enterprises owned by individuals or households that are not constituted as separate legal entities independent of their owners) whose employment size is below a certain threshold
- (b) For which no complete accounts are available that would permit a financial separation of the production activities of the enterprise
- (c) Which produce at least some of their goods or services for sale or barter
- (d) And/or which are not registered under specific form of national legislation (Chakrabarti 2009).

explicit promise of preferential/detrimental treatment in employment, threat about present or future employment, interference with work and offensive, humiliating or intimidating treatment (Act § 2 (n)).

In conformity with the Vishaka guidelines, the Act provides for the setting up of an Internal Complaints Committee (ICC) by every employer, to deal with complaints of sexual harassment at the workplace. The ICC is to be headed by a senior woman employee and have a minimum of four members, including representatives from the employers, the employees and a neutral, external member (Act § 4). However, the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules 2013 (Rules)* to the Act state that the quorum for the ICC is three members, which in effect means that the committee may take decisions even in the absence of the external member (*Rules Rule 7(7)*). In case an organisation has less than 10 employees, or where charges of harassment have been levelled against the employer himself, the Act mandates the creation of a Local Complaints Committee (LCC) (Act § 6(1)). The chairperson of the LCC should be a woman involved in social work, or issues relating to women. The rest of the LCC comprises a woman representative from the area under the jurisdiction of LCC and two other members, of whom one has to be a woman associated with an NGO, or organisations involved in social work (Act § 7(1)).

A victim of sexual harassment should make a written complaint to the ICC/LCC ideally within three months from the date of the incident, or last incident, of sexual harassment (Act § 9). Before starting the formal inquiry, the ICC/LCC can, at the request of the victim, initiate a process of conciliation between her and the respondent (Act § 10(1)). This provision has been disapproved by many as undermining gender equality. The Verma Committee has observed that 'conciliation in cases of sexual harassment is antithetical to the intended result, inasmuch as the concept of conciliation pre-supposes the existence of a valid complaint' (Verma 2013: 135-136). In the event that there is no conciliation, the ICC/LCC is required to proceed with the enquiry. The enquiry has to be completed within 90 days and the ICC/LCC is required to prepare a report stating its findings within 10 days from the completion of the inquiry (Act § 13).

The Act provides for protection of the privacy of the victim and specifically excludes obtaining information about the inquiry proceedings under the *Right to Information Act 2005* (Act § 16). Further, during the enquiry the victim or the respondent can be transferred to other departments, or the victim can be sanctioned leave for up to three months (Act § 12(1)).⁸ If the respondent is found guilty, the act of sexual harassment is treated as misconduct in accordance with the service rules or the rules prescribed under the Act and his wages/salary may be deducted to pay compensation to the aggrieved woman (Act § 13(3)(i)). The Act also provides safeguards against malicious complaints and the punishment prescribed for false or malicious complaints are similar to those for sexual harassment (Act § 14(1); *Rules 10*).

Impact of the law

Shortly after enactment of the new legislation, India witnessed a spate of high profile cases against retired Supreme Court judges, directors of research institutes and NGOs, and editors of magazines. Most of the cases received tremendous publicity but await final verdicts.⁹ Although the new legislation is a welcome step towards protection of women, it suffers from two major limitations. The first substantive problem lies with the definition of sexual harassment. Sexual harassment is defined as an unwelcome act or behaviour; however, the law does not set any standard for determining 'unwelcomeness'. This is much needed, as conduct amounting to sexual harassment cannot be adjudicated by the objective touchstone of reasonableness alone (Das Gupta 2016). In a land of diverse cultures, behaviour viewed as unwelcome by a woman from a particular background may not be perceived as unwelcome by another. Again, from a patriarchal perspective, a sexually coloured remark may be construed as a benign compliment, while pursuit of a woman may be construed as wooing her.

Scholars have argued that popular Indian movies (Bollywood films) nurture this patriarchal perspective by glorifying, in cinema, violence against women and glamorising acts of harassment such as stalking (Ramasubramaniam and Oliver 2003). Bollywood cinema is a huge industry and has a broad audience

⁸ The Act does not specify whether the leave is paid or unpaid leave. It simply says that the leave granted to the victim shall be in addition to the leave that she is otherwise entitled to (Act § 12(2)).

⁹ Interestingly, in cases against the retired judges, the Supreme Court abdicated its responsibility by declaring that representations made against former judges could not be entertained by the administration of the Supreme Court (See generally, *Business Standard* 2014).

worldwide. Thus, if popular Indian cinema conveys the idea that sexual aggression is expected in romantic relationships, the same tends to become internalised within the limits of acceptable Indian social behaviour. Interestingly, the impact of popular Indian cinema on male psyche finds place in judgments of other countries as well. For instance, in January 2015, an Australian court accepted that the cultural background of a 32-year-old Indian man was a factor that induced him to stalk two women. The defendant argued that he was heavily influenced by Bollywood movies which made him to believe that 'doggedly pursuing women will eventually cause them to relent' (Pearlman 2015). The judge accepted that due to his unique cultural conditioning, the defendant did not appreciate that his conduct was criminal (Pearlman 2015).¹⁰

To understand the yardstick of 'unwelcomeness', it is important to view the legislation from the eyes of the victim, rather than the aggressor. Women usually blame themselves, or feel guilty, about sexual overtures that come their way. This makes it difficult for them to speak out publicly against sexual harassment in the first place. In a recent case of sexual harassment in India, the victim (a lawyer) had given an account of her feelings in a blog:

I dodged police barricades and fatigue to go to the assistance of a highly reputed ... Supreme Court judge ... for my supposed diligence, I was rewarded with sexual assault (not physically injurious, but nevertheless violating) from a man old enough to be my grandfather. I won't go into the gory details, but suffice it to say that long after I'd left the room, the memory remained, in fact, still remains, with me. So what bothered me about this incident? As a conditioned member of (Indian) society, I had quickly 'gotten over' the incident. But was that what worried me: that I had accepted what was essentially an 'unacceptable' situation. The more I thought about it, the more I realized that the crux of my unease lay in my inability to find a frame in which to talk, or even think, about my experience. (James 2013a)

After writing the blog, the victim faced severe flak for speaking out publicly against a Supreme Court judge. This compelled her to write an explanation to clarify that she had not acted irresponsibly and had merely written the blog to 'warn young law students that status and position should not be confused for standards of morality and ethics' (James 2013b), thus considerably diluting her earlier writing.

In view of the problems mentioned above regarding defining 'unwelcome' conduct, the Verma Committee had suggested that, along with all other factors, 'in determining whether the behaviour or act complained of is unwelcome, one of the factors to be given due weight shall be the subjective perception of the complainant' (Verma 2013: 30). The incorporation of this suggestion would have ensured a blend of objective and subjective standards while determining sexual harassment and offered better protection to women from different cultures and backgrounds. Unfortunately, this has not been incorporated in the new law.

The second problem with the law is procedural and lies with the creation of the ICC. The Supreme Court had already provided for the creation of an internal redressal system. However, empirical evidence shows that creation of an internal complaints committee is not enough unless employers are sensitised. While mandating the creation of the ICC, the law is surprisingly silent regarding the procedure to be followed by employers while appointing members of the ICC. Cases reported since the enactment of the law reveal that complaints have mostly been filed by junior women against men in senior positions. As the constitution of the ICC is left to the employer, there is high possibility that ICC members are favourably

¹⁰ Although the judgment has been delivered as per the Australian law and its definition of sexual harassment, the author is making this point to support the argument regarding popular Hindi cinema and Indian male psyche being heavily influenced by such cinema, such instances not being limited to India alone.

disposed towards senior employees for professional reasons.¹¹ The Verma Committee had voiced similar apprehensions by observing that in house filing of complaints may induce suppression of legitimate complaints (Verma 2013: 131). The redressal mechanism envisaged under the *Act* turns a blind eye to the internal politics and power dynamics of every organisation, where the employer may have a vested interest in protecting the more powerful and influential aggressor. Given the nascent stage of the law, a neutral, independent tribunal would have been a more appropriate forum to effectively deal with cases of sexual harassment.

Conclusion

Enactment of the new sexual harassment law is evidence of India's commitment towards promoting equality and gender justice in the workplace. However, there are several challenges in enforcement of the law. The principal problem is the interpretation of unwelcome behaviour in view of India's largely patriarchal social system. The second challenge is ensuring justice for victims through the mechanism of the ICC, which may itself suffer from an internal conflict of interest. With regard to the latter, fundamental amendments to the *Act* may be required so that victims of sexual harassment are able to seek justice without being compelled to take recourse other remedies like criminal law. However, the larger issue is one of gender sensitisation. In a country with widespread gender bias and cultural prejudices, it remains to be seen how the Indian judiciary responds to cases of sexual harassment and begets social and attitudinal changes through its interpretation of the new legislation.

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¹¹ An example is the high profile case of a managing editor of a magazine vehemently defending its editor in a complaint of sexual assault against the latter by a junior lady colleague (See *DNA* 2013).

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New Lads or Ladettes? A Critique of Current Theoretical Explanations for Young Women's Violence Proliferated over Social Media

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Abstract

Current theoretical explanations for young women's violence examine physical violence as a masculine behaviour. This means that young women are constructed as rejecting elements of their femininity in favour of masculine behaviours in order to perform violence in an acceptable way, which results in them being constructed as violent femmes, new lads or ladettes. Alternatively, theoretical explanations construct young women as adhering to a feminine gender performance when avoiding physical violence, or engaging what are traditionally considered to be feminine characteristics of aggression. This paper critiques existing theoretical approaches applied to young women's violence, by drawing on empirical research that examined young women's physical altercations proliferated through social media. Preliminary research findings illustrate how continuing to construct young women's violence through a gendered paradigm offers inadequate explanations for what young women's violence actually entails. It concludes by suggesting how young women's violence may be more adequately explained using a theoretical framework of embodying gender that moves away from gender dichotomies and constructs violence as a series of bodily practices.

Introduction

Young women's violence is not a new phenomenon. However, since young women's engagement in violence was first acknowledged by criminological scholarship, it has been explained through a masculinist paradigm. This means that physical violence is constructed as a behaviour that forms part of accepted masculine performances of gender and is intertwined with hegemonic masculinity. Young men can perform violence as a way of establishing their masculine identity, yet conversely such physical violence is depicted as an unacceptable behaviour for young women. This paper draws on empirical research consisting of structured observation and thematic analysis of 60 online videos featuring physical altercations between young women uploaded to five social media platforms. The research aimed to critique current theoretical explanations for young women's violence. Analysis of both the content of the online videos, themselves, as well as the comments posted by the online viewers allows this paper to begin to show how existing theoretical works do not offer adequate explanations for what young women's violence actually entails. This paper does this first by illustrating how young women's violence is contextualised in existing criminological literature. Second, it outlines the approach taken by both traditional and feminist theoretical frameworks. Third, it sets out the methodological framework that underpins the research data. Fourth, the research data is used to critique existing theoretical approaches and demonstrate how they may offer limited explanations for young women's violence. Finally, this paper begins to show how a new theoretical framework of embodying gender is needed to more fully account for young women's violence away from this dichotomous gendered construction. It suggests that this could be done by reconceptualising violence as a series of bodily practices.

Gendered explanations for young women's violence

Criminological scholarship examines young women's violence in a gendered way by intertwining physical violence with the current construct of hegemonic masculinity (Chesney-Lind 1997; Chesney-Lind and Shelden 1992). Hegemonic masculinity is a socially fluid concept that dictates the scope of accepted masculine performance that all men should engage in to establish their masculine gender identity (Tomsen 1998, 2008). Men are able to use violence to demonstrate their engagement in this masculine ideal, which requires men to display behaviours such as being dominant, assertive, and aggressive

(Connell 2005; Connell and Messerschmidt 2005). However, young men's violence is also constructed from a gender neutral position in that men's violence is not considered to be a gendered issue, and it is taken for granted that violence is a masculine behaviour (Campbell 1993; Gilbert 2002). As a result, literature examining young men's violence focuses on their engagement in violence itself, which has caused men's engagement in violence to go unquestioned (Salter and Tomsen 2012; Tomsen 2008).

Constructing violence in this way has negatively impacted on how young women's violence is conceptualised. Intertwining young men's violence with hegemonic masculinity means that violence has yet to be conceptualised as part of an accepted hegemonic feminine gender performance. Currently hegemonic femininity requires young women to be quiet, passive and demure (Jones 2008; Jones and Flores 2012; Wesley 2006). As a result, no theories of feminine violence have moved beyond conceptualising violent young women in masculine terms (Connell 1999; Connell and Messerschmidt 2005; Lorber 1994). This has contributed to young women's engagement in violence being perceived as uncharacteristic or aberrant, and for violent young women to be constructed as violent femmes, new lads or ladettes (Batchelor 2011; Miller 2001; Sharpe 2012). As a result, those young women who engage in violence are seen as worse than their male counterparts. This is because not only are young women being physically violent, but they are also rejecting behaviours associated with socially accepted performances of femininity in order to do so (Batchelor 2011; Carrington 2013; Miller 2001).

Masculine constructions of violence and criminological theories

Constructing young women's violence in masculine terms is reinforced by both traditional and feminist criminological theories. Traditional theories were written by men, to apply to the experiences of men and, therefore, provide limited or distorted views of the experiences of women (Chesney-Lind and Shelden 1992). This was because statistically young men commit the vast majority of criminal offences, which rendered young women's engagement in crime and violence not significant enough to warrant consideration by traditional theories (Boots and Wareham 2012). In addition to only providing limited consideration for women's experiences, traditional criminologies were constructed as gender neutral. It was assumed traditional theories were equally applicable to men's and women's offending behaviours — despite providing very limited consideration for women's experiences (Chesney-Lind, Morash and Stevens 2008; Chesney-Lind and Shelden 1992;). Additionally, traditional criminologies considered crime to be an abnormal behaviour for women. This can be clearly illustrated by drawing on the works of Lombroso (see Baez 2010) who focussed on the biological nature of crime and deviance. While his work provided some limited consideration for criminal women, he argued that women who engaged in crime were 'underdeveloped men' and emphasised the fact that women who engaged in crime were abnormal (Baez 2010: 564). Lombroso theorised that 'normal' women focussed on looking after children and respecting their husbands, while criminal women were: sexually and morally deviant, lacked modesty, brazen, and lived an irregular life (Baez 2010: 564). These examples demonstrate how women's engagement in crime and violence has traditionally been constructed through a masculine lens, and is considered an anomalous behaviour for women (Abramson and Modzelewski 2011).

The assumption that traditional criminologies were applicable to female criminality was criticised by emerging feminist criminologies which developed around the time of women's liberation (Daly and Chesney-Lind 1988). This marked the first time that the uniquely gendered experiences of women were considered separately from the experiences of men (Daly and Chesney-Lind 1988). However, in spite of this, feminist theories continue to examine young women's engagement in violence through gender dichotomies and construct young women's violence as an anomalous or aberrant behaviour. This can be best illustrated by examining four feminist theories. These are: the sexualisation thesis, the sisters in crime thesis, structural opportunity theories, and the ladette thesis. While each of these theories moves beyond the approach taken by traditional criminologies, all four continue to adhere to gendered constructions of violence and examine young women's violence using masculine terms.

The sexualisation thesis does not specifically look at young women's engagement in violence, as it was written to explain why official crime statistics show that young women offend at a much lesser rate in comparison to their male counterparts (Carrington 2013; Chesney-Lind 1997). This theory developed prior to the separation of the child welfare and juvenile justice systems and theorised that young women were more likely to be policed through welfare systems. This meant the focus was on young women's welfare needs even when they had committed a criminal offence (Carrington 2013; Chesney-Lind 1997). The sexualisation thesis shows how young women were held to a different set of behavioural standards in comparison to young men. This resulted in young women being processed through welfare systems for failing to adhere to accepted performances of femininity by doing things like: engaging in violence; being sexually promiscuous; being uncontrollable; or for running away, even when they had committed a criminal offence. As these were welfare offences, this resulted in young women's transgressions failing to appear in official crime data. Further, these offences were rarely, if ever applied to young men, who were policed through criminal justice systems when they committed a criminal offence (Chesney-Lind 1997; Chesney-Lind and Shelden 1992). However, most importantly, the sexualisation thesis illustrates how young men's engagement in these behaviours was not considered a welfare issue, but rather seen as a normal or natural part of being masculine (Carrington 1993, 1996). Young women engaging in violence, on the other hand, was an issue that required state intervention as young women were seen as transgressing feminine gender norms to engage in violent behaviour (Carrington 1993, 1996).

In contrast, the sisters in crime thesis (Adler 1975), structural opportunity theories (Simon 1975), and the ladette thesis (Carrington 2013; Sharpe 2012) all specifically relate to young women's engagement in violence. The sisters in crime thesis and structural opportunity theories were written around the time of women's liberation and both theorised that as women gained increased social and structural opportunities that were more equal to their male counterparts, their engagement in crime and violence would also become more equal (Adler 1975; Simon 1975). However, in making this argument each of these theories fail to move beyond the gendered constructions of violence; their central premise being that the increased social and structural opportunities that were afforded to women by women's liberation (including engagement in crime and violence) was due to the masculinisation of feminine behaviour. That is, women were being afforded the opportunity to reject traditional feminine gender norms and engage in behaviour traditionally defined as masculine, which caused their engagement in crime and violence to increase (Batchelor 2011; Chesney-Lind 1997; Daly and Chesney-Lind 1988). As a result, these theories continue to construct violence in masculine terms and consider young women's engagement in violence to be uncharacteristic and unfeminine.

The ladette thesis (Carrington 2013; Sharpe 2012) takes this approach one step further and argues that young women are now actively choosing to reject traditional feminine behaviours in favour of masculine ones which has resulted in them being defined, or defining themselves, as new lads or ladettes (Carrington 2013; Sharpe 2012). The ladette thesis also emphasised the increased public attention being given to the issue of young women's violence. This has resulted in the ladette thesis being described as the new sexualisation thesis, as it illustrates how the focus has shifted away from young women's sexual or moral transgressions, and towards their engagement in physical violence (Carrington 1993). The ladette thesis shows how the issue of young women transgressing heteronormative gender norms is still the subject of social panic, as young women are depicted as actively rejecting traditional feminine gender behaviours to engage in violence — as currently women cannot be simultaneously constructed as both violent and feminine (Batchelor 2011; Carrington 2013; Sharpe 2012). Each of these theories illustrate that while the introduction of feminist criminologies enabled criminological theories to allow for the consideration of the experiences of women, young women's engagement in physical violence has yet to be conceptualised away from masculine gender ideals. Empirical research has begun to illustrate how continuing to examine young women's violence in this manner has resulted in this issue being inadequately understood.

Methodological framework

This paper draws on the results of an empirical research project that aimed to examine: what young women's violence proliferated over social media looked like, which performances of violence were encouraged and rewarded in the online context, and how young women performed gender when engaging in physically violent behaviour. In order to do this, structured observation and thematic analysis of 60 fight videos, which had been uploaded to five social media platforms between January 2012 and July 2013, was conducted (Larkin and Dwyer 2016). Fight sites or social media platforms were defined as web based applications that produce user-generated content, shared by communities based on mutual interest (Bluett-Boyd, Fileborn, Quadara et al 2013: 88). Both the fight sites and videos used in this project were selected using a purposive sampling method (Champion 2006; Hagen 2010). The fight sites were selected on the basis that they allowed the online viewers to post comments to each specific fight video and more than 10 fight videos had been uploaded to each of the sites during the selected timeframe. The timeframe was chosen to ensure the most up to date videos formed part of the sample.

The fight videos themselves were selected according to the presence of key words in the titles or comments, such as: chicks, chick-fight, street fight, brutal, extreme fight, and insane girl fight. The content of the videos, as well as the comments posted to each video by online viewers, were analysed as research data. The content of each fight video was analysed according to predetermined characteristics on a coding schedule, which involved the collection of both qualitative and quantitative variables. These included: the number and ratio of the fight participants, what the fight participants were wearing, and where the fight took place (Given 2008; Martinko and Gardner 1985, 1990). The verbal comments made in the fight video, as well as the comments posted to each fight video by the online viewers comprised qualitative data collected. Both the qualitative and quantitative data were sorted into key themes and thematically analysed. This approach allowed this project to draw detailed conclusions regarding what young women's violence looks like and how young women performed gender when engaging in violence proliferated online. More importantly, this research has begun to demonstrate how the existing theoretical frameworks are inadequate for considering what young women's violence actually entails.

Critique of existing theoretical approaches

In contrast to arguments made in literature and criminological theories, young women in the sampled fight videos were not rejecting a feminine performance of gender in favour of a masculine one in order to engage in violence underpinned by masculine characteristics of aggression, such as punching, kicking, or wrestling (Batchelor 2011; Jones 2009; Mullins and Miller 2008). Nor were young women adhering to a traditional feminine gender performance and either avoiding physical violence altogether, or engaging in feminine characteristics of aggression, such as relational aggression, scratching, or slapping (Jones 2008; Jones and Flores 2012; Miller 2002). These characteristics are considered to be typically feminine, especially relational aggression as it centres around verbal abuse and manipulation (Henriksen and Miller 2012). Engaging in a feminine performance of gender means that the young women continued to present themselves in a stereotypically feminine way by wearing feminine clothing, such as dresses, skirts and jewellery, and incorporated elements of relational aggression into their physical altercations (Larkin and Dwyer 2016). This can be contrasted with engaging in a masculine gender performance where young women try to disguise their femininity and present themselves in a stereotypically masculine way or consider themselves to be masculine when engaging in violence (Miller 2001, 2002).

The young women in the videos studied appeared to blur gender dichotomies, and continued to present themselves in a stereotypically feminine way, while engaging in physical violence that is traditionally seen as brutal and masculine acts of aggression (Larkin and Dwyer 2016). Further to this, there was an expectation by the fight participants, audience to the altercation and the online viewers that the physical altercations be carried out in this manner. This was illustrated in a number of ways. For example, the online viewers would post comments to encourage the use of brutal and masculine fighting techniques and post comments saying: 'that girl knows[s] how to fight ...'; 'Damn ... She destroyed her face'; 'Why are

these females so strong now ... they hit like dudes now' (Larkin and Dwyer 2016). Similar comments were also made by the audience to the altercation who would yell things like: 'Hit her!', 'Beat her ass!', 'Get her to the ground!', while the altercation was occurring (Larkin and Dwyer 2016). The need for the young women to engage in brutal and masculine characteristics of aggression while also maintaining a feminine performance of gender was most succinctly demonstrated by a comment posted by one online viewer who stated: 'word of advice while fighting: look like a lady, fight like a man' (Larkin and Dwyer 2016). This preliminary data begins to illustrate how young women are not rejecting feminine gender behaviours in favour of masculine behaviours in order to engage in violence in an acceptable way, which demonstrates the limited understandings for young women's violence offered by existing theories.

Concluding thoughts

This paper has drawn on empirical research that examined the proliferation of young women's violence over social media to challenge the explanations of young women's violence by both traditional and feminist criminological theories. The basis for this critique is that existing theoretical frameworks continue to intertwine accepted performances of violence around accepted performances of masculinity. Currently, the only way that young women might perform violence according to mainstream perspectives is to be constructed as a masculine 'lad' as violence continues to be depicted as an aberrant behaviour for young women. However, the proliferation of violence over social media has provided insight into what young women's physical altercations actually look like. This research has demonstrated that, in contrast to existing theories, young women may not be rejecting feminine gender behaviours in favour of masculine behaviours in order to perform violence in an acceptable way. As a result, there is a need to develop a new conceptual framework of embodying gender that constructs violence away from gender dichotomies and reconceptualises these interactions.

What might a reconceptualisation of young women's violence look like? How might we rethink young women who fight so they are no longer sensationalised as the new 'lads'? One way this might be done is to think about violence as a practice involving young people's bodies, made up of a set of micro practices that are not necessarily gendered. Taking this approach makes it possible to think about violence outside of gender dichotomies as performing gender becomes just one factor that may contribute to how bodies perform violence. This allows violence to be reconceptualised as a behaviour that the body performs, rather than being constructed as an inherently masculine gendered practice. Not only might reconceptualising violence away from masculine gender behaviours allow criminological theories to provide more adequate consideration for what young women's violence actually entails, it may also allow for this issue to be more adequately understood, responded to and prevented.

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Realising Resilience in Youth Justice

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Conference subtheme: Young people and the criminal justice system

Abstract

The concept of resilience, while still evolving, offers the possibility of addressing the needs of young offenders outside of custody. England and Wales has the highest rate of child imprisonment in Europe and one of the lowest ages of criminal responsibility at 10 years of age (Howard League for Penal Reform 2008). Young people who populate the criminal justice system come from the most disadvantaged in society and it can be argued that many are victims before they become offenders (Jacobson, Bhardwa, Gyateng et al. 2010). Therefore, these young people have a number of unmet needs which cannot be addressed in custody and, although community sentences offer a better opportunity to at least address their needs, what is required is a more holistic approach. It is possible that ways to realise resilience in the young person's community could provide the best way to address their criminal behaviour. Acknowledging their hidden resilience and focusing upon their strengths, rather than their deficits, offers the best way of realising the resilience of young people involved with the criminal justice system. According to Ungar (2011), resilience is observed when individuals engage in behaviours that help them to navigate their way to resources they need to flourish. Adequate resources require increased social justice through the more equitable distribution of resources allowing for people's social ecologies to meet those needs. Community sentences in a growth-fostering environment offer the best way forward.

Introduction

Youth justice has been dominated by the risk factor paradigm for the last two decades. The identification and management of risk in the name of public protection obscures more than it reveals. It emphasises individual responsibility, and the locus for change is always the individual to be dealt with by various interventions which fail to acknowledge the role of wider social processes. A Prison Reform Trust (PRT), report entitled *Punishing Disadvantage: A Profile of Children in Custody* (Jacobson, Bhardwa, Gyateng et al. 2010), found that children and young people in custody are the products of multiple forms of disadvantage:

It is widely recognised within the criminological research literature ... that offending by children is strongly associated with forms of disadvantage. These 'risk factors' for offending include disadvantages relating to family life; the wider social environment in which children live; socio-economic status; experiences of and responses to education, and emotional and psychological needs and dispositions. (Jacobson, Bhardwa, Gyateng et al. 2010: 48)

Putting children and young people in custody exacerbates this disadvantage. Seeing young people who commit crimes as a menace to be controlled justifies the assessments of risks and the interventions to address them. However, it only provides a partial picture of the young person as the processes by which risks are assessed primarily focus on psychosocial domains and largely ignores wider socio-structural factors. These processes also de-individualise responses to young people as they allocate individuals to a generic risk category that may lead, in some cases, to disproportionate or inappropriate interventions (Case and Haines 2006). Young people who commit crime present with a number of complex needs which cannot be met in custody. The youth justice system is adult-centred and concerned with managing and controlling the young people in their care. There is an emphasis on problems and young people are seen through a negative lens. They are also marginalised in their own rehabilitation as they are primarily perceived as risks to be managed as opposed to collaborators in their own reform.

The very act of oversimplifying potentially complex dynamic phenomena into readily quantifiable and targetable risk 'factors' is an exercise in crude reductionism, the results of which cannot hope to accurately represent the lived realities of young people. (Case and Haines 2006: 103)

The research on resilience points to a more participatory, forward-looking youth justice system which engages the young person whilst recognising their strengths and competencies, and works with them to foster positive growth and pro-social choices going forward. Currently, young people and their communities are seen as the source of their own problems and the wider socio-structural environments, which produce and reproduce numerous oppressions, are largely ignored. Young people are not separate from their environment and living with poverty, violence and unemployment can shape and limit the opportunities available to them. Their experiences materialise in numerous ways, including depression, truancy, substance misuse and anti-social, criminal behaviour. Viewed from an institutional perspective, these behaviours are perceived as negative, sometimes meaningless, but for the young person they represent resilience in the face of significant adversity. Such behaviours also represent diversity and do not fit easily into pre-prescribed categories. When resources are scarce, children and young people may turn to problem behaviours to find a powerful way to assert a preferred identity as a survivor (see Boyden and Mann 2005; Ungar 2005).

Realising resilience

The concept of resilience, whilst still evolving, offers the possibility of addressing the needs of young offenders outside of custody. Resilience is defined as:

In the context of exposure to significant adversity, whether psychological, environmental, or both, resilience is both the capacity of individuals to navigate their way to health sustaining resources, including opportunities to experience feelings of well-being, and a condition of the individual's family, community and culture to provide these health resources and experiences in culturally meaningful ways. (Ungar 2008: 225)

A more holistic approach emphasises the primacy of the physical and social ecology in fostering resilience (Ungar 2004a, 2004b, 2008, 2011, 2012). While Ungar recognises the role of individual abilities, he disagrees that some individuals are in and of themselves, resilient. Resilience, he believes, is not a fixed trait of the individual as personality is malleable and influenced by the ability of the physical and social ecology to support and facilitate health sustaining resources to young people who experience significant adversity. Secondly, Ungar believes that it is the dynamic interaction between the individual and their environment that is pivotal as personal agency and motivation are necessary to navigate towards culturally meaningful resources.

Therefore, the literature on resilience emphasises the importance of the social ecology in facilitating access to health sustaining resources which young people can then navigate towards to foster growth (Ungar 2008). The social ecology in Ungar's (2012) sense refers to a series of interlocking systems which influence young people in both direct and indirect ways. He further argues that we must move beyond the micro systems of home and school to include the macro system, which is the actual culture of the young person (Ungar 2008).

Disadvantaged young people who experience significant adversity, such as abuse and neglect over time, and/or those who reside in toxic and dangerous environments suffer significant adversity and multiple disadvantage. The subject-centred approach places the responsibility for resilience on the victim (young person), a position criticised by Rutter (2005). Ungar deliberately de-centres the child in order to remove blame from them for failing to develop positively in such hostile environments and instead holds that the environments in which they live, and not the individual young person, should be the focus for change

(Ungar 2011). He deliberately attempts to dispel the myth of the 'invulnerable child', the child who bounces back despite the odds and identifies the physical and social ecology in which the child resides as both cause and solution. The behaviour of young people in such toxic environments is made understandable in terms of its functionality; anti-social/criminal behaviour reflects the nature of the environment and the choices reflect the constraints, controls and oppression within that environment. Therefore, a shift in focus is required as there is evidence that resilience is less an individual trait and more a quality of the child's physical and social ecology, 'so de-centering the child in the argument shows that the locus of change lies in the processes by which environments provide resources for use by the child' (Ungar 2011: 6).

Hidden resilience refers to those skills and abilities developed by children to cope within the environment in which they find themselves, and which Ungar (2004b) believes can be built upon through providing meaningful resources in the environment. When the physical and social ecology provides access to available and culturally meaningful resources, children will navigate towards those resources, negotiating for what they need to flourish. This involves personal agency and motivation, and motivation can be encouraged by community support for the use of those resources. Therefore, there is a dynamic interaction between the young people and their environment which can facilitate positive growth. Understanding hidden resilience as a cultural artefact expressed in a particular context can inform interventions that are less likely to be resisted (Ungar 2005).

A social ecological understanding of resilience draws upon Bronfenbrenner's (1979) ecological systems theory as a way to understand how the interactions between individuals and their environments impact individual development. Ungar (2008) argues that resilience is more likely to occur when services are provided in ways that make it more likely that every child and young person will do well in ways that are contextually relevant. According to Gilligan (1999), there are three building blocks that underpin resilience: a secure base which provides a child with a sense of belonging and a sense of security; good self-esteem, an internal sense of self-worth and competence and self-efficacy; and the self-belief in one's own personal strengths. All of this, Ungar argues, can be provided through social support in the environment as resilience is not a static trait of the individual, but the result of interactions between the individual and their environment:

But resilience, the capacity to overcome adversity, is not just a measure of how well some children behave in ways we approve of. The paradox is that resilience is equally present in young people whom we have labelled as dangerous, delinquent, deviant and/or disordered. Resilient youth take advantage of whatever opportunities and resources that are available — even those we consider negative or destructive. That negative behaviour shown in troubled young people can actually signal a pathway to hidden resilience that is, just like the one chosen by their well-behaved peers, simply focused on the need to create powerful and influential identities for themselves. (Ungar 2005: 1)

Resilience and the youth justice system

Robinson (2015) argues that embedding Ungar's theory of resilience within the youth justice system offers the possibility of fostering positive growth and pro-social outcomes. Like Ungar (2004b), she believes that young people who come to the attention of the youth justice system are resilient but, due to the way that young offenders are processed and assessed, this resilience is not recognised. Their resilience may manifest in dysfunctional ways, but this does not mean that they are not resilient. She (Robinson 2015) further believes that this resilience can be harnessed and redirected via a focus on strengths and competencies within a more cooperative, collaborative and participatory way of working. To achieve this there needs to be a recognition and acceptance by youth justice practitioners that what are currently perceived as dysfunctional and risky behaviours actually represent resilience and, although the adaptation may not be law abiding, it can demonstrate adaptive coping in impoverished and

disadvantaged communities. Robinson (2015) further agrees with Ungar (2004b) that all people, including young people, are driven to form an identity which needs to be forged from the experiences and opportunities available to them, and maladaptive ways of coping represent an effort to forge an identity giving the young person some agency and control over their own lives. Therefore, the starting point for facilitating a changed relationship with young people is to listen to them and attempt to understand the young person's behaviour and choices in terms of the meaning it has for them. From this platform, gains can be made by reframing the negative ways in which young people are perceived — moving from delinquent, defiant, challenging, and a focus on deficits, to a reframing of behaviours in more positive language, such as coping, surviving, thriving (Robinson 2015).

This more holistic approach recognises the strengths the young person possesses and also acknowledges the role of wider social processes, and how they constrain and limit the opportunities for young people. Resilience aids the potential to realise the strengths and capacities of young people both in the youth justice system and in services to young people in general. However, it is not a panacea and it has weaknesses. The functionality of young people's behaviour may be better understood through an understanding of hidden resilience; however, offending behaviour at the most fundamental level still focuses on the individual who has to change and this has echoes of the current individualistic approach of the risk factor prevention paradigm in youth offending. It also diverts attention away from the power and responsibility of the state to address unjust social and economic policies.

It is for this reason that resilience can be defined as the individual's ability to navigate to resources, as well as the capacity of the individual's environment to provide resources that protect the young person in ways that are meaningful (Ungar 2008). Unless the young person is empowered to negotiate for what they need, the resources that are provided are unlikely to be used (Bottrell 2009). Engaging with young people in processes that let them be empowered and heard in the design of their care plans is likely to ensure a maximum benefit.

Youth justice itself needs to be put in context, and young people's social capital needs require the provision of goods and services to young people through their physical and social ecologies. This can only happen when the production and reproduction of wider social and economic injustices are addressed. Attention must be paid to the impact of racism, the influence of poverty, and the effects of violence and unemployment in communities; specifically, how young people navigate these. A thorough examination of the larger economic, social and cultural forces that affect the actions, choices and behaviours of young people is also required. Bottrell, in her study of girls (age 13-24) living on the Glebe, a housing estate in Sydney Australia, found that 'The classic conceptualization of resilience as positive adaptation despite adversity is evident in the girls' negotiation of their circumstances and achievement of positive outcomes' (Bottrell 2009: 326). The estate is characterised by and perceived as a problem area, as one girl says, 'Oh, you live in Glebe, you're a thug'. (Bottrell 2009: 496). The aim of the research was to understand young people's perspectives on schooling and truancy. She found that truancy represented positive adaptation under adversity; the school did not welcome young people from the Glebe. They felt looked down on and many truanted school in order to find a sense of belonging and acceptance not available there. The youth centre provided what the school did not; not only a sense of belonging and acceptance, but a sense of identity and a feeling of power over the ability to construct their own identity and not have it thrust upon them in negative terms by those from outside. This behaviour also reflects the failure of the school to act as a bridging institution — to provide opportunities for the acquisition of social capital as opposed to closing down opportunities through alienation.

This study provides a very good example of resilience at work, but also of the limitations of resilience to bridge social injustice:

When both adversity and resilience are conceptualised as social and relational constructions, the strengthening of disadvantaged communities may be as dependent on recognising and shifting relations of privilege as it is on building strengths of the marginalised. (Bottrell 2008:24)

Conclusion

The youth justice system in England and Wales processed almost 100 000 children and young people in the year 2012/13 (Youth Justice Board 2014). This is testament to the wider social injustices to which most of these young people have been subjected. Young people's criminal behaviour is a form of communication and an indication of 'hidden resilience', both of which presents an opportunity to engage with them in their own rehabilitation. This necessitates a different perspective towards young people who come into conflict with the law — a perspective that frames these young people not as a risk to be managed and controlled into conformity, but as valued individuals possessing not only hopes and dreams, but unrealised potential and unrealised skills and competencies. Only then when young people feel they have a voice, are listened to, and what they say is heard and considered important can real progress be made. However, to fully foster resilience the wider physical and social ecology must furnish young people with the resources that they need to build a solid sense of identity and to realise their potential in the fullest sense. And for that we need more change at the level of government — more socially-just policies, which foster inclusion rather than exclusion. The PRT report, *Punishing Disadvantage* (2010), highlighted how many young offenders are given custodial sentences for non-violent offences. The money currently spent on prison sentences could be re-routed to helping foster resilience through community punishments. And finally, to really realise the hidden resilience of young offenders, we as a society need to change our perspective of them and our politics.

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